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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 193.

THE FIRST NATIONAL BANK OF CHARLOTTE, PLAINTIFF IN ERROR,

vs.

THE NATIONAL EXCHANGE BANK OF BALTIMORE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED JUNE 25, 1874.

Chief Justice

SUPREME COURT OF THE UNITED STATES.

No. 193.

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1 In the court of appeals of Maryland, April term, 1874.

THE FIRST NATIONAL BANK OF CHARLOTTE, (N. C.,) appellant,
vs.
THE NATIONAL EXCHANGE BANK OF BALTIMORE, appellee.

To the honorable James L. Bartol, chief judge of the court of appeals of Maryland:

The petition of the First National Bank of Charlotte respectfully sheweth:

That the construction of sundry clauses of the Constitution and statutes of the United States, more especially of the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, is drawn in question in the above-entitled suit, and certain titles, rights, privileges, and immunities are claimed by your petitioner therein under the said Constitution and statutes, and the decision of the said court of appeals, where the said suit and record thereof is, and where judgment in said cause was rendered, is against the titles, rights, privileges, and immunities, specially claimed and set up by your petitioner therein under the said Constitution and statutes, and is a final judgment in said suit in the highest court of the State of Maryland in which a decision in the said suit can be had:

Wherefore, your petitioner respectfully prays your honor to allow to it a writ of error in the premises, returnable to the Supreme Court of the United States, for the correction of such errors as shall
2 appear in the rendition of the judgment of the court of appeals of Maryland, and in the record and proceedings in the said suit, according to the provisions in the acts of Congress in such cases made and provided; and your petitioner will ever pray, &c.

DENNIS & SCOTT,
Attorneys for the First National Bank of Charlotte.

It appearing to me that the petitioner is entitled to the allowance of a writ of error in the premises, the said writ is accordingly, by me, James L. Bartol, chief judge of the court of appeals of Maryland, this 9th day of May, eighteen hundred and seventy four, allowed as prayed.

JAS. L. BARTOL,
Ch. J. Ct. of Appeals of Maryland.

3 *Citation.*

To the National Exchange Bank of Baltimore, the United States of America greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the second Monday of October next, pursuant to a writ of error directed to the court of appeals of Maryland, wherein the First National Bank of Charlotte is plaintiff, and you are defendant in error, to show cause why a judgment rendered in said court on appeal to the said court of appeals against the plaintiff in error, as in said writ of error is mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand as chief judge of the said court of appeals of Maryland, this 9th day of May, eighteen hundred and seventy-four.

JAS. L. BARTOL,
Ch. J. Ct. of Appeals of Maryland.

Service of the above citation is this 28th day of May, 1874, made upon me as attorney of the National Exchange Bank of Baltimore.

WM. F. FRICK.

4 (Indorsed:) The First National Bank of Charlotte vs. The National Exchange Bank of Baltimore.

Mr. JAMES L. FRANKLIN,
Clerk of Court of Appeals of Maryland:

Please file within petition, allowance of writ, citation, and admission of service.

ANDREW STERRET RIDGELEY.
DENNIS & SCOTT,
Attorneys for Plaintiff in Error.

Filed June 17th, 1874.

5 THE UNITED STATES OF AMERICA, *to wit:*

DISTRICT OF MARYLAND, *to wit:*

[SEAL.] The President of the United States of America to the judges of the court of appeals of the State of Maryland, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in said court, before you, between the First National Bank of Charlotte, appellant, and the National Exchange Bank of Baltimore, appellee, a manifest error hath happened, to the great damage of the First National Bank of Charlotte, as by its complaint appears; and

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court of appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the First National Bank of Charlotte and the National Exchange Bank of Baltimore, wherein was drawn in question the construction of sundry clauses of the Constitution and statutes of the United States, and certain titles, rights, privileges, and immunities were claimed by the First National Bank of Charlotte under the said Constitution and statutes, and the decision was against the titles, rights, privileges, and immunities specially set up or claimed under the said clauses of the Constitution and statutes, a manifest error hath happened, to the great damage of the said First National Bank of Charlotte, as by its complaint appears:

6 We, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what

of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, this ninth day of May, in the year of our Lord one thousand eight hundred and seventy-four.

Issued this 9th day of May, A. D. 1874.

JAMES W. CHEW,
Clerk of the Circuit Court of the U. S. for the 4th Circuit and District of Maryland.

7 (Endorsed:) The First National Bank of Charlotte vs. The National Exchange Bank of Baltimore.

Mr. JAMES S. FRANKLIN,
Clerk of Court of Appeals of Maryland:

Please file within writ of error.

ANDREW STERRET RIDGELEY &
DENNIS & SCOTT,
Attorneys for Plaintiff in Error.

Filed June 17th, 1874.

8 Know all men by these presents that we, R. Y. McAden and M. P. Pegram, are held and firmly bound unto the National Exchange Bank of Baltimore in the full and just sum of one hundred dollars, to be paid to the said National Exchange Bank of Baltimore, its certain attorney, successors, and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 6th day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at the court of appeals of Maryland, in the city of Annapolis, county of Anne Arundel, in that State, in a suit depending in said court between the First National Bank of Charlotte, appellant, and the National Exchange Bank of Baltimore, appellee, judgment was rendered against the First National Bank of Charlotte; and the said the First National Bank of Charlotte having obtained a writ of error to remove the said cause to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said court to reverse the judgment rendered in the aforesaid suit, and a citation directed to the said National Exchange Bank of Baltimore, citing and admonish-
9 ing it to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said First National Bank of Charlotte shall prosecute the said writ of error with effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) R. Y. McADEN. [SEAL.]
(Signed) M. P. PEGRAM. [SEAL.]

Sealed and delivered in the presence of—
(Sign') JNO. F. ORR.

I, D. W. Oates, a notary public in the town of Charlotte, in the State of North Carolina, do hereby certify that on the 6th day of June, in the year of our Lord one thousand eight hundred and seventy-four, person-

ally appeared before me the above-named obligors, to me personally well known, and made oath in due form of law that they are, and each of them is, worth the full amount of one hundred dollars, after their just liabilities are paid, and are perfectly good and responsible for the within-named amount. I further certify, of my own knowledge, that I believe them to be so responsible. In witness whereof I hereto affix my bond and notarial seal the day and year aforesaid, in the town and State aforesaid.

{ D. W. OATES, NOTARY PUBLIC, } (Signed) D. W. OATES,
{ CHARLOTTE, NORTH CAROLINA. } *Notary Public.*

10 The sufficiency of the above security is approved by me, the chief judge of the court of appeals of Maryland, this 13th day of June, A. D. 1874.

(Signed) JAS. L. BARTOL,
Ch. J. Ct. of Appeals of Md.

MARYLAND, *sct:*

I, James L. Franklin, clerk of the court of appeals of Maryland, do hereby certify that the foregoing is a true and correct copy of the original bond in the case of the First National Bank of Charlotte vs. The National Exchange Bank of Baltimore, deposited in the office of the clerk of the court of appeals of Maryland.

In testimony whereof I hereto set my hand as clerk and affix the seal of the said court of appeals this 18th day of June, A. D. 1874.

[SEAL.] J. S. FRANKLIN,
Clerk Court of Appeals of Maryland.

11 (Indorsed:) The First National Bank of Charlotte vs. The National Exchange Bank of Baltimore. Copy.

Mr. JAMES S. FRANKLIN,
Clerk of Court of Appeals of Maryland:

Please file within copy of bond & approval.

ANDREW STERRET RIDGELEY,
DENNIS & SCOTT,
Attorneys for Plaintiff in Error.

Filed June 17th, 1874.

12 MARYLAND, *sct:*

At a court of appeals of the State of Maryland, begun and held at the city of Annapolis on the first Monday in October, being the sixth day of said month, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-seventh—

Present: The honorable James L. Bartol, chief judge; Richard H. Alvey, James A. Stewart, George Brent, Oliver Miller, John M. Robinson, Richard Grason, Richard J. Bowie, associate judges; James S. Franklin, clerk—

Were had, among other, the following proceedings, to wit:

13 THE FIRST NATIONAL BANK OF CHARLOTTE
vs.
THE NATIONAL EXCHANGE BANK OF BALTIMORE.

Be it remembered that now, here, on the first Monday in April, being

the seventh day of the said month, in the year of our Lord 1873, the judge of the superior court of Baltimore City, being in the eighth judicial circuit of Maryland, in pursuance of the directions of the act of assembly in such case made and provided, transmit, to the court of appeals here the record of proceedings of a plea which was lately depending before him in the said superior court of Baltimore City, between the First National Bank of Charlotte, plaintiff, and the National Exhange Bank
14 of Baltimore, defendant, and wherein the said superior court gave judgment for the said The National Exchange Bank of Baltimore against the said The First National Bank of Charlotte, and from which said judgment the said The First National Bank of Charlotte appealed to the court of appeals here, the tenor of which said record of proceedings is in form following, to wit:

15 In the superior court of Baltimore City.

THE FIRST NATIONAL BANK OF CHARLOTTE, plaintiff, *against* THE NATIONAL EXCHANGE BANK OF BALTIMORE, defendant. } In the superior court of Baltimore City.

J. Upshur Dennis, John Scott, Jr., for plaintiff; I. N. Steele, Wm. F. Frick, for defendant.

Action commenced September 10th, 1869.

Declaration.—Filed 10th September, 1869.

In the superior court of Baltimore City.

BALTIMORE CITY, to wit:

The First National Bank of Charlotte, by J. Dean Smith, its attorney, sues the National Exchange Bank of Baltimore—

1. For money payable by the defendant to the plaintiff, for goods bargained and sold by the plaintiff to the defendant.
2. For work done and materials provided by the *the* plaintiff for the defendant, at its request.
3. Money lent by the plaintiff to the defendant.
4. Money paid by the plaintiff for the defendant, at its request.
5. Money received by the defendant for the use of the plaintiff.
6. Money found to be due from the defendant to the plaintiff on accounts stated between them.
7. For money had and received by the defendant, belonging to the plaintiff, and which it is against equity and good conscience for the defendant to withhold from the plaintiff and retain, received as follows: $5,000 on 1st October, 1866, $4,440.63 on 1st January, 1867, $4,506.25 on 1st April, 1867, $4,571.88 on 1st July, 1867, $4,637.50 on 1st October, 1867, $4,703.13 on 1st January, 1868, $4,768.75 on 1st April, 1868, $4,834.38 on 1st July, 1868, and $4,900 on 1st October, 1868, together with interest on the same from the date of the receipt of said sums respectively.

And the plaintiff claims $100,000.

J. DEAN SMITH,
Attorney for Plaintiff.

Agreement of counsel, &c.—Filed 27 January, 1873.

In the superior court of Baltimore City.

THE FIRST NATIONAL BANK OF CHARLOTTE
vs.
THE NATIONAL EXCHANGE BANK OF BALTIMORE.

16 Plea of non-assumpsit and never indebted filed, and errors of pleading waived as to them and the declaration.

DENNIS & SCOTT,
Attys. for the Plaintiff.
WM. F. FRICK,
For Deft.

Issues joined.

27 January, 1873. Submitted to the court for determination without the aid of a jury.

3d February, 1873. Verdict for the defendant; same day judgment on the verdict for the defendant.

8th March, 1873. Verdict and judgment struck out by the court.

15 March, 1873. Motion by plaintiff for a new trial; same day motion overruled.

15 March, 1873. Verdict for the defendant; same day judgment on the verdict for the defendant.

12th May, 1873. Appeal by the plaintiff from judgment, from the refusal of the court to grant a new trial, and from all orders to which exceptions are taken, including the orders overruling plaintiff's motion, and the order entering final judgment for the defendant.

Bill of exceptions.—F'd 12 May, 1873.

In the superior court of Baltimore City.

FIRST NATIONAL BANK OF CHARLOTTE
vs.
THE NATIONAL EXCHANGE BANK.

At the trial of the above-entitled cause, the same having been submitted to the court without the aid of a jury, the plaintiff, to support the issues on its part, proved by John Wilkes that in the year 1865, he, the said John Wilkes, was president of the plaintiff, a national bank, duly organized in September, 1865, and carrying on the banking business under the acct of Congress, passed in 1864, commonly known as the "National Banking Act," in Charlotte, North Carolina; that in the month of December, 1865, after the plaintiff had been organized and carrying on business as aforesaid, for some months, with a view to increase its capital stock, which then amounted to $55,000, Wilkes was sent on by its board of directors to Baltimore City, Maryland, with drafts belonging to the said bank, on parties in New York City, to purchase United States bonds, and to deposit them with the proper Department at Washington City, in accordance with the provisions of said act, and thereby obtain an increase of the plaintiff's capital stock; that he employed a broker's firm, of Bayne & Company, in Baltimore, to procure said bonds; that said firm undertook to sell and deliver them at Washington to him, as plaintiff's agent, but declined to accept the aforesaid drafts in payment thereof; that thereupon Wilkes, as agent of the plaint-

iffs, agreed with said Bayne & Company to go to New York, collect said drafts and pay said Bayne & Company for said bonds, by depositing the amount to their credit in New York, and in the mean while gave said firm, as security for said $50,000.00 of bonds, a certificate of deposit for $55,000.00 of bonds of the United States, drawn in Charlotte, North Carolina, previous thereto, which is as follows:

17 FIRST NATIONAL BANK OF CHARLOTTE, N. C.,
Charlotte, December 15, 1865.

[U. S. rev. stamp, 5 c.]

Received on deposit, from Bayne & Co., fifty-five thousand U. S. 5-20 bds., 3rd issue, payable to the order of themselves on the return of this certificate.

JNO. WILKES,
Prest. 1st Nat. Bk. of Charlotte, N. C.

$55,000 5-20s, 3rds.

(Endorsed:) BAYNE & CO.

(Written on its face:) "Cancelled, having been satisfied prior to December 25, 1865.

"J. W."

That the words, "cancelled," &c., written across its face, were written by Wilkes at the time the same came into his possession, as hereinafter stated. That said certificate was drawn for $55,000.00 instead of $50,000.00, the amount agreed to be delivered by Bayne & Company, because at the time of its being drawn in Charlotte, North Carolina, the plaintiff intended to purchase, through Bayne & Company, $55,000.00 of said bonds.

That it was agreed between Wilkes, as plaintiff's agent, and Bayne & Company, that the latter were not to pass the certificate off, but retain it until discharged, as above mentioned, by payment for it; that thereupon Wilkes went to New York, collected said drafts, deposited them to the credit of Bayne & Company; that said firm delivered to said Wilkes, as plaintiff's agent, United States bonds, such as are mentioned in said certificate, to the amount of $50,000.00, in Washington, on or about December 20th, 1865, which were duly deposited in the proper Department at Washington, and the capital of plaintiff duly increased; that said bonds were those to secure which the certificate was delivered to said Bayne & Company. That the following is a correct statement of the account between the plaintiff and said Bayne & Company, (the defendant also admitting it to be prima-facie correct:)

T. W. Dewey, cashr., in acc. with Bayne & Co., Dr.

1865.

Oct. 31.	To balance as per acct. rend., 62		5 50	531	88
Dec. 19.	" John Wilkes' check			250	
" " " " "	13		2 71	1,000	
21	Cash for 50,000 5-20 bds., delivered in Washington, a. 100, and int., and ¼ o-o coms., 11		92 36 50	383	33
22.	J. Wilkes, presdt's check, 10		3 33	2,000	
Jan. 1.	Bal. int.		52 51		
" "	To balance of acct			2,368	23
			156 41	56,533	44

CR.

1865.					
Nov. 18.	By remittance, 44		3 90	531	88
Dec. 2.	" " 30		25 30	5,060	
6.	Cash deptd. by J. Wilkes, pt. in N. Y., 26		21 66	5,000	
	Carried forward				
18	Brought forward				
	1865.				
Dec. 8.	Cash deptd. by J. Wilkes, pt. in N. Y., 24		22 79	5,697	80
11.	Cash deptd. by J. Wilkes, pt. in N. Y., 21		14	4,000	
19.	Cash deptd. by J. Wilkes, pt. in N. Y.			20,700	
"	Cash deptd. by Blossom Bros			6,000	
"	" " " Becker, 13		65 43	3,500	
30	" " " J. M. Mitchell, 2		1 66	5,000	
22.	" " " Darrell & Nash, 10		1 67	1,000	
Jany. 1.	By bal. int., a. 6 o-o, 52, 51, a. 5 o-o			43	76
			156 41	56,533	44
1866.					
January 1.	By balance			2,368	23
2.	Colln. J. M. Mitchell			2,000	
3.	" "			500	
				4,868	23
	Less Jany. 3, dft. No. 1		51 45		
	" " 4, " " 4		100.	151	45
	Cr. balance, Jany. 6th			4,716	78

Baltimore, Jany. 6th, 1866.

BAYNE & CO.,
Per W. REMINGTON.

E. & E. O.

And that the balance due from said firm to the plaintiff, on January 6th, 1866, after paying for said bonds, amounted to $4,716.78; that none of the items in said account, prior to 19th Decr. '65, had any reference to the said bonds, but related to the general dealings of the Charlotte Bank with Bayne & Company, who were its general agents in Baltimore.

That the plaintiff received, during January and February, 1866, verbal assurances from Bayne & Company, that said *said* certificate was satisfied and subject to its order, and in March, 1866, a written assurance from the said firm to the same effect. That in April following, after Bayne & Company had failed, the plaintiff was notified by the defendant that it held the said certificate, and that it demanded a delivery of the bonds mentioned therein, alleging it to have been transferred to the defendant by Bayne & Company as collateral security for loans made by the defendant to the said firm which had not been repaid; that thereupon the plaintiff notified the defendant that the said certificate was satisfied, and disavowed all liability on account thereof. That Wilkes went to Baltimore in May, 1866, to negotiate for possession of said certificate, and as agent of the plaintiff, offered the defendant

$5,000 for it to avoid suit; that the defendant offered to take $20,000 for the certificate, and threatened to sue them unless this sum was paid, which Wilkes refused to pay; that Wilkes, however, requested the defendant to take no action until he could consult again with the plaintiff's directors, and went back to Charlotte. That Wilkes returned to Baltimore in July, and again in September, 1866; that he discovered the defendant's agents were anxious to reduce the liabili-
19 ties to the defendant of said Bayne & Company, by selling the stocks obtained, as hereinafter mentioned, from said firm as collaterals, and after much negotiation with the defendant through its agents, he agreed to buy from the defendant, for the plaintiff, certain other securities held by the defendant, for its loans to said firm, viz., 400 shares of stock of the Washington, Alexandria and Georgetown Railroad Company, and 1,000 shares of stock of the Maryland Anthracite Coal Company, for $40,000, paying $80 per share for the railroad-stock, its par value being $100 per share, and $8 per share for the coal-stock, its par value being $10 per share; that as part of the same transaction, Wilkes agreed to buy, on his individual account, from the defendant, 125 shares of the stock of the plaintiffs, the par value being $100 per share, for $15,000, for which he gave his individual notes; that Wilkes' first idea was to buy the said last-mentioned stock for the plaintiff, in which event he would have bought for it less of the other stock hereinbefore mentioned, but abandoned this determination on being advised that a national bank could not purchase its own stock; that the said 125 shares of stock of plaintiff was his own, and did not in anywise belong to plaintiff, and was always so treated.

That throughout the said negotiations Wilkes refused to acknowledge, on the part of the plaintiff, any liability on account of said certificate of deposit, and that by the said agreement the said $40,000 to be paid by the plaintiff was to be paid for the stock aforesaid, and no part of said sum was paid for the said certificate or in settlement thereof. That witness would not have paid the money if the defendant had not given up the $55,000 certificate. That he purchased the stocks to save litigation about said certificate. That the whole transaction deserved the name of a compromise—each party being unwilling to go into court—each party was to suffer by Bayne, and each agreed to bear part of the loss. That this was his view of the transaction. That it was uncertain whether the proposition for the agreements in regard to said stock came from the part of the plaintiff or defendant.

That before this Wilkes went to Washington and elsewhere and inquired thoroughly into the value of said stock, and gave 25 per cent. more for them than they would have brought in the market; that he discovered there was a controversy pending in Washington in regard to the parties entitled to the property and franchises of the railroad, but the result of the suit was more than probable. That under these circumstances there was no certain market-value for the stock issued by the railroad company; that part of it was alleged to be spurious, but that two rival railroad corporations, viz, the Baltimore and Ohio Railroad Company and the Pennsylvania Central Railroad Company, were negotiating for the said Washington, Alexandria and Georgetown Railroad and its franchises, it being, at that time, the only railroad crossing the Potomac River at Washington; that Wilkes, after inquiring as above, concluded the future value of said stock would be at or above par; that he bought his stocks on his own judgment and on that of the parties of whom he inquired, and not on the faith of any representations as to its value made by the defendant's agents, and that he makes no charge of bad faith or

misrepresentations against them. That said stock, if then thrown on the market, would not have brought more than $30,000; but Wilkes' belief and expectation, at time of said agreement, was that it would increase greatly in value. That the stock of the plaintiff was worth about par, and that shortly before that time it had paid a dividend of twenty per cent. Plaintiff further proved that the defendant held other stocks, amongst them that bought by Wilkes for his individual use as aforesaid, acquired in a similar manner from said Bayne & Company, whose indebtedness to the defendant, at the time of their failure, was very large.

That in payment of the above sum of $40,000, and in pursuance of the said agreement, said Wilkes paid the defendant, for the plaintiff, out of the plaintiff's funds, $5,000 in cash or its equivalent, and caused to be executed eight certificates of indebtedness of the plaintiff, in favor of the defendant, each for $4,375, for the remaining $35,000—the said certificates bearing 6 o-o interest, and payable severally three months apart—the first payable on Jany. 1st, 1867, the last on Oct. 1st, 1868; that they were received by the defendant in pursuance of the agreement, and were duly discharged at their maturity, making in all paid by the plaintiff to the defendant, under the said contract, $42,362.68.

That the certificate for the 1,000 shares of the coal-stock had been delivered to the plaintiff in 1867, but the railroad-stock had never been transferred—the same having been in suit at the time of the agreement; that plaintiff had received dividends on the coal-stock amounting in all to $400; that Wilkes continued to be a director in the plaintiff till some time in 1868.

The plaintiff, through its attorneys, prior to the commencement of the trial of this cause, and at the time it was called for trial, tendered to the defendant in court the certificate for the 1,000 shares of the coal-stock, and the dividends received therefrom, with interest on the same from the time of their receipt, marked "Cancelled," &c., on its face, as appears therefrom; also the certificate of deposit of bonds aforesaid, (offering to agree not to plead limitations in event of a suit thereon.)

It was admitted in the case, by both parties, that both plaintiff and defendant had been duly organized as national banks under the act of Congress of 1864, commonly known as the "National Banking Act," and as such had been conducting the banking business from a period prior to December, 1865, to the present time, and that this was known to the defendant's agents throughout the whole of the transactions above mentioned.

The plaintiff further adduced in evidence two letters—one from the plaintiff's attorney to the defendant, which was duly received, and the other in reply thereto from the defendant's attorney, which was duly received by plaintiff—which were as follows:

BALTIMORE, *August 7th*, 1869.

To the president and board of directors of the National Exchange Bank of Baltimore:

GENTLEMEN: As attorney of the First National Bank of Charlotte, N. C., I am instructed to notify your bank association that the Charlotte Bank repudiates in whole and in part the transactions by which John Wilkes, its late president, made a certain certificate of deposit for $55,000 of 5-20 U. S. bonds, and which was afterwards, by one L. P. Bayne, fraudulently delivered to the officers of your bank in the cause of illegal transactions had between them. And the bank of Charlotte

especially repudiates, as unauthorized, illegal, fraudulent, and void, the pretended sale made by the officers of your bank of certain so-called stock (which is still in the hands of your bank) to said Wilkes, and the payment made by the officers of the Charlotte Bank of the sum of $40,000, which went into the funds of the Exchange Bank.

On behalf of the bank of Charlotte, I hereby demand the immediate repayment of said sum of $40,000 and interest from the date at which the same was paid into your bank.

21 The foregoing notification of repudiation and demand for restitution of said sum is made for the following among other reasons:

1st. The certificate of deposit was void ab initio. The Charlotte Bank was forbidden, by the 36th section of the banking act, from creating any such liability. Wilkes had no power or authority to make it, either general or special. It certified to what both Wilkes and Bayne knew was false.

2nd. The certificate was obtained by fraud, was worthless in Bayne's hands, and was not a negotiable instrument. Bayne's assignment to you carried the equities with it.

3rd. The officers of your bank had constructive notice of the above, and took the certificate in transactions expressly forbidden by the 29th section of the banking act, and therefore void, as was for the same reason the taking of this paper.

4th. The money of the Bank of Charlotte was paid to your bank under false representations of the officers of your bank as to the title of the Exchange Bank to the stock of the railroad company and the coal company. The bank, in fact, has no title whatever to the stock, and the only title it could by any possibility have had was that of a mere pledge, which cannot be sold or conveyed.

5th. The Washington, Alexandria and Georgetown Railroad stock is spurious and fraudulent, and not worth the paper it is printed on.

I trust that the due consideration of the above will induce you to order the immediate restitution of said sum of $40,000, with interest, to the Bank of Charlotte, and thus save the exposure and expense of litigating what is so plainly, according to the fundamental rules of law and business honesty, indefensible.

Respectfully,

J. DEAN SMITH,
Atty. of First National Bank of Charlotte.

BALTIMORE, 43 *Lexington St., Aug.* 16, 1869.

J. D. SMITH, Esq., *Atty., &c.:*

DR. SIR: Your communication as attorney of the 1st National Bank of Charlotte, N. C., add'essed to the president and directors of the National Exchange Bank of Baltimore, has been referred to me, as the attorney of the latter bank, with the request that I should reply to it. I am instructed to say that the president and directors of the National Exchange Bank, in view of all the circumstances connected with the settlement of their claim against the Bank of Charlotte, are surprised at the attempt now made to repudiate that transaction; and they are especially astonished at the manner in which the Bank of Charlotte has seen fit, through you, to impute fraud to the agents of the National Exchange Bank in the making of the settlement in question. The National Exchange Bank recognizes no right, legal, equitable, or honest, in the National Bank of Charlotte to claim restitution of money paid upon a fair, valuable, and perfectly well understood consideration. It declined to entertain your proposition to return that fund upon any of the

grounds set forth in your letter, and leaves the Bank of Charlotte to take such course as it may be advised to pursue in this matter.

Yours, respy.,

WM. F. FRICK.

And rested its cause.

The defendant then proved, by ROBERT M. SPILLER, that he was a director of the defendant in the year 1866. That it made large loans to the broker's firm of Bayne & Company aforesaid, and took from them collaterals to secure the same, of which they always furnished a list, with their signatures attached; that the said Spiller, on account of an injury to the defendant's cashier, H. R. Riddle, by which he was disabled in the spring of 1866, when the Government examiner came to examine into the defendant's affairs, had to look into the condition of the defendant. That he found said cashier had been loaning large amounts of defendant's money to said firm, taking securities as collaterals, a list of which he found. Among them were a quantity of Washington, Alexandria and Georgetown Railroad stock, Maryland Anthracite Coal stock, Cannel Coal stock, Santa Clara Mining Company's stock, two certified checks of the Merchants' National Bank of Washington, 125 shares of the plaintiff's stock, par value $12,500; and also a certificate of deposite of the National Bank of Charlotte, in favor of said firm, for $55,000.00 United States (5-20) five-twenty bonds, payable to the order of themselves, and indorsed by Bayne & Company. The board of directors of defendant desired witness to go to Charlotte to collect the said certificate from the plaintiff, but not being able to leave his business, Mr. J. Dean Smith, the regular attorney of the defendant, was sent instead. The said Smith returned in company with the plaintiff's president, John Wilkes, who came to witness' dwelling-house, and there met with witness, Daniel H. Miller, the defendant's then president, now deceased, and Henry C. Smith, also a director of the defendant. As nearly as witness could remember, Wilkes informed the defendant's said agents that the plaintiff had settled with Bayne & Company for this certificate; they, of course, told him they had nothing to do with that, and the defendant would immediately proceed to sue the plaintiff. While Wilkes said he had settled the matter with Bayne & Company, he said it would be fatal to the plaintiff's intended arrangement to increase its capital stock and circulation $50,000.00, to be sued at that time, and asked for time to go back and confer with the stockholders and directors of the plaintiff before any proceedings should be begun against it. Wilkes went home, and returned some time afterwards to Baltimore, and stated to witness he had called a meeting of plaintiff's directors and stockholders, who had agreed with him it would be fatal to them to have a suit brought on the aforesaid certificate of the plaintiff, in view of its purposes and plans at that time. Witness suggested to Wilkes, as he was pressed for time, to come that evening to his dwelling. Wilkes had already stated he had been authorized to settle the matter if possible. At witness' dwelling he again met the above-mentioned Miller and Smith, as well as the witness, and with them arranged the settlement, which was as follows, viz: The defendant agreed to sell to the plaintiff the said certificate, some Washington, Alexandria and Georgetown Railroad stock, and some Maryland Anthracite Coal Company's stock, at prices agreed upon at that meeting, and to take in payment certificates of indebtedness of the plaintiff for $40,000, payable in instalments. This agreement was finally made at that meeting; there was no formal written agreement, but there might have been some rough

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pencil memoranda of the amount of the stocks the plaintiff was to get and the prices it had to pay. Witness stated to Wilkes some of the securities were very doubtful; that the railroad stock was then in suit. He replied he could carry them as a suspended debt account, which struck witness as something new in national banking. Next morning Wilkes came down to the defendant's place of business to carry out the arrangement. He sat at the directors' table, with all around, and the whole matter was explained to him. They showed him the entire condition of the Washington, Alexandria and Georgetown Railroad stock, and explained it could not be transferred; that there was a suit about it in Washington, and gave him all the information they possessed on
23 the subject. They dealt with Wilkes in entire good faith, and neither concealed nor attempted to conceal from him any knowledge they had in relation to the securities. The arrangement was then carried out, and the certificate of deposit delivered to Wilkes. Wilkes subsequently told witness that he had submitted the settlement to the directors of plaintiff, who had approved it, and sent on the certificate of indebtedness above mentioned. Witness thought there was also correspondence between plaintiff and defendant in regard to the railroad stock sold to plaintiff as aforesaid, instructing defendant to defend the suits on behalf of the plaintiff with reference to that stock, and to charge the plaintiff with its proportion of the expenses—the defendant also holding a large number of shares of said railroad stock in addition to the amount conveyed to the plaintiff. Witness further stated J. Dean Smith, the then attorney of the defendant, approved of the settlement fully, and said it was a most admirable arrangement. Witness further proved the capital stock of the defendant, throughout the whole periods of the above transactions, was $600,000.00, and that the indebtedness of Bayne & Company to it, at the time of their failure, amounted to three or four hundred thousand dollars; that he did not know who first mentioned the subject of the sale of stocks—Wilkes or the defendant's agent—but that they talked over a number of plans together, in order to settle the matter, so as to avoid suit. Wilkes discovered the defendant held the above stocks by seeing a list of them at the meeting in witness' house. Witness was not certain the idea of the above sale of said stocks did not originate there.

Witness thought at that time the railroad stock had no market-value, and the coal stock had little or none; he did not know in round numbers the market-value of the securities obtained by defendant from Bayne & Company in the aggregate, because the Maryland Anthracite Coal stock, the Washington, Alexandria and Georgetown Railroad stock, the Cannel Coal Company's stock, and the Union Pacific Railroad stock, which comprised a large portion of the above securities, had no market-value at all.

The defendant further produced HENRY C. SMITH, a competent witness, who, being duly sworn, testified that he was one of the defendant's directors in 1866; that as such he was present at the meeting in Spiller's house in September of that year, when the above-mentioned agreements between the plaintiff and defendant were made—he, the said Smith, acting as one of the agents of the defendant in the negotiations which then occurred, as well as the said R. M. Spiller and D. H. Miller, then president of said defendant, but who has since died. That there Wilkes disavowed all liability on the part of the plaintiff for the above-mentioned certificate of deposit, but in order to obtain it offered to buy the said 400 shares of railroad stock and 1,000 shares of the coal stock, at $80 per share for the former—its par vaulue being $100—and $8 per

share for the latter—its par value being $10 per share—for the plaintiff from the defendant, and the 125 shares of the plaintiff's stock from the defendant for his own individual use, for $15,000. That the defendant's agents being then informed by said Wilkes that under his instructions he could not treat with the defendant on the basis of any liability of the plaintiff for the said certificate, the above offer was gladly accepted, and it was agreed that the certificate should not form a part of the consideration for which the sum above mentioned, of $40,000, should be paid, but that he himself regarded the surrender of the certificate as the basis and essence of the transaction, and, except for the controversy in relation thereto, the said agreements would never have been made, nor the certificate delivered up with the other stocks, unless the $40,000 was paid or secured; that on the next day this agreement
24 was ratified by the whole board of defendant's directors, at its usual place of business, and consummated, and the certificate was then delivered to Wilkes in pursuance of the understanding of the previous day in regard thereto. That the indebtedness of Bayne & Co. to the defendant, on loans secured by pledge of collaterals, amounted, at the time of their failure, to $185,000; that the capital stock of the defendant had been throughout $600,000; that the defendant's agents did not regard the said stock as worth the money which Wilkes offered for it; that witness did not know the coal stock was selling during that month, at the Baltimore Stock Board, from $4 to $7 per share; that he regarded the railroad stock as having no market-value; that all the said stock before mentioned, as well as the said certificate, were held as collateral securities for loans made by the defendant to Bayne & Company, and that when the agreements aforesaid were ratified, $55,000 were credited on Bayne & Co.'s loan-account; that the 125 shares of plaintiff's stock sold to Wilkes was always thereafter treated by him, the defendant, as his property, and not that of the plaintiff; that there was no want of good faith on the part of either party in the transactions, but the same was conducted in fairness throughout.

The defendant further produced H. R. RIDDLE, a competent witness, who testified that in December, 1865, and in the winter and spring of 1866, he was the cashier of the defendant; that as such he received from Bayne & Company, on December 18th, 1865, the above-mentioned certificate of deposit, along with other securities, as collaterals for a call-loan of $80,000, then made by the defendant to said Bayne & Company; that the indebtedness of said firm to the defendant, on call-loans on collaterals, at that time, amounted to $250,000, inclusive of the $80,000; that the defendant was in the custom of loaning large sums on call to said firm on collaterals, and that the said certificate remained in said defendant's possession as such collateral until the failure of said firm, along with the other stock hereinbefore mentioned; that at the time of the failure of said firm, the defendant had on hand, as collateral securities for call-loans made to them by it, and which were unpaid, the following securities, including the stocks above mentioned:

(The list of securities will be filed in the court of appeals.)

On cross-examination of the witness he proved, that before the failure of Bayne & Co. the railroad stocks aforesaid was worth almost its par value; that defendant had then loaned thereon money to Bayne & Company, at the rate of $80 per share; that it depreciated greatly after the failure of said firm; in September, 1866, it was worth over $50 per share, but had no market-value, for the parties who held it could not afford to throw it on the market at that price; that in September, 1866,

the coal stock above mentioned was selling at the Baltimore Stock Board for from $4 to $7 per share.

The defendant further read in evidence certain correspondence between the plaintiff and the defendant in 1866 and 1867, subsequent to the agreement of 1866, showing that 400 shares of R. R. stock were regarded and treated by both parties as belonging to the plaintiff; that both had agreed to prosecute, in common with other parties who held stock of said Washington, Alexandria and Georgetown Railroad, a suit, by which said stock was affected; that a common fund was raised for that purpose, to which the plaintiff had contributed its share as owner of the 400 shares above mentioned; and rested its case.

Thereupon the plaintiff offered the following prayers:

1st. If the court shall find from the evidence that John Wilkes, as president and agent of the plaintiff, a national bank duly incorporated under the act of Congress of 1864, commonly known as "the national banking act," agreed with the agent of the defendant, also a national bank duly incorporated under the same law, to purchase for the plaintiff from the defendant four hundred shares of the stock of the W., G. & A. R. Road and one thousand shares of the stock of the Maryland Anthracite Coal Company, as mentioned in the evidence, for the sum of $40,000 of the plaintiff's funds, and that the said Wilkes did then, in pursuance of said contract, pay to the defendant $5,000 in cash, or its equivalent, out of the funds of the plaintiff, and did cause to be executed eight certificates of indebtedness of the plaintiff in favor of the defendant, each for the sum of $4,375, payable in instalments at the end of every three successive months, with six per cent. interest thereon for the remaining $35,000, which were received by the defendant, and that the said certificates were duly discharged at their maturity, then the court must find for the plaintiff the amount of the several sums so paid by the plaintiff, together with legal interest thereon from the dates of the respective payments—if the court shall see fit, in its discretion, to allow interest—provided the court shall further find that at the time of the said agreement the agents of the defendant knew the plaintiff was a national bank duly incorporated as aforesaid; although the court shall further find that the certificate of deposit of Dec'r 15th, 1865, mentioned in evidence, was also delivered to said Wilkes in consequence of said contract, if by the said contract no part of the said $40,000 was to be paid therefor, but that the same was to be paid for the aforementioned stocks.

2nd. If the court shall find that, some time in Sept'r, 1866, John Wilkes, as agent of the plaintiff, a national bank, as set forth in plaintiff's first prayer, agreed to purchase from the defendant, also a national bank as aforesaid, through its agents, for the plaintiff, 400 shares of stock of the W., G. & A. Railroad Company, mentioned in evidence, and 1,000 shares of the Maryland Anthracite Coal Co.'s stock for the sum of $40,000, to be paid to the defendant out of the plaintiff's funds, and also contracted individually, in his own name, to buy from the defendant, through its said agents, for his own use, 125 shares of the stock of the plaintiff, held by the defendant, for $15,000, of his own funds, and that the two agreements were made at the same time, and that the inducement to both agreements was his desire to obtain the certificate of deposit of Dec'r 15th, 1865, mentioned in evidence, still the fact that he did thereby obtain the said certificate, and that it was understood between him and the defendant's agents, at the time of making said agreement, that he was to obtain it, does not enure to make the said first-mentioned contract valid, provided the court shall

find that, by the said first-mentioned contract, the consideration for which the sum of $40,000 was to be paid was the railroad and coal stock aforesaid, and that therein it was agreed that no part of said sum was to be paid for the said certificate of deposit.

3rd. If the court shall find that John Wilkes, as president and agent of the plaintiff, a national bank duly incorporated under the act of Congress of 1864, commonly known as the "banking act," which facts were known to the defendant's agents, the defendant likewise being a national bank incorporated as aforesaid, in order to compromise the certificate of deposit mentioned in evidence, agreed with such agents to purchase for the plaintiff from the defendant the said certificate of deposit of Dec'r 15th, 1865, mentioned in evidence, 400 shares of stock of the Washington, Alexandria and Georgetown Railroad Company, and 1,000 shares of the Maryland Anthracite Coal Company's stock, for $40,000, out of the plaintiff's funds, and that the said sum was
26 duly paid in the manner set forth in the plaintiff's first prayer, then the plaintiff is entitled to recover so much of the sum so paid as the court shall find was paid for the said stocks, with legal interest on the several payments from the respective dates thereof, if the court shall, in its discretion, see fit to allow interest.

4th. If the court shall find that John Wilkes, as president of the plaintiff, a national bank organised as set out in plaintiff's former prayers, agreed with the officers of the defendant, also a national bank as aforesaid, who knew the fact that the plaintiff was a national bank, to purchase from the defendant for the plaintiff the certificate of deposit of Dec'r 15th, 1865, mentioned in evidence, as well as the r. road and coal company stock mentioned in the evidence for $40,000, and that the said sum was paid in the manner set forth in the plaintiff's first prayer, and that the attorney of the plaintiff wrote to the defendant the letter of August 7th, 1869, offered in evidence, which was duly received and answered by the attorney of the defendant in the letter of August 16th, 1869, and that these letters were written prior to the institution of this suit, that then the effect of the said letters was to waive all tender of what was received by the plaintiff under the said contract, and the plaintiff is entitled to recover the several amounts so paid of its funds, together with legal interest from the dates of the payments, if the court, in its discretion, shall allow interest; provided the court shall find that the defendant was not prejudiced by the delay of the plaintiff to rescind the contract, and that the same was done in a reasonable time; and in estimating such reasonable time, the court may take into consideration the character of the plaintiff and its board of directors, and when there was a change in such board and in the administration of its affairs, and all the other circumstances attending the said contract.

After argument thereon on January 29th, 1873, it being later than the usual hour of the court's adjournment, the counsel for the defendant arguing the case both upon the law and the facts, the plaintiff's counsel confining themselves to the discussion of the law, under the impression that a separate discussion upon the facts would be allowed, the defendant's counsel made some remarks to the court as to the difference between the hypothesis of facts as stated in the prayers and the evidence in the cause. Whereupon the counsel for plaintiff stated, that when the cause was again taken up, they would offer additional prayers, as to which no such questions could arise, and thereupon the court adjourned.

On the next day, on going into court, the counsel for the plaintiff

were informed by the court that the whole case was closed, and no further argument would be allowed; but upon their representation that they had acted under a different impression, the court consented to hear a further argument on the facts when the case could be again resumed. On January the 31st, the court until then not resuming the said case, a further argument was had on the facts of the said case—the court not deciding on the said prayers then; and after the said argument the court adjourned; and thereupon, during the pendency of the causes assigned on a succeeding day, and without notice to and in the absence of the counsel on both sides, the court decided and ordered as follows:

The law of these prayers, 1, 2, 3, and 4, is granted by the court, but, upon the hypothesis offered, the court finds a verdict for the defendant.

27 *Opinion of the court.*

In the superior court of Baltimore City.

THE FIRST NATIONAL BANK OF CHARLOTTE
vs.
THE NATIONAL EXCHANGE BANK OF BALTIMORE.

This case, having been referred to the court for determination without the aid of a jury, has been heard and considered, and is now decided. The court admits the general proposition of law to be true, as contended for by the plaintiff, that a national bank is not authorized by the act of Congress to purchase stocks, either for speculation or investment, and, if the facts of this case justifies such an interpretation of the transaction between the plaintiff and the defendant, would have no hesitation in assenting to the propositions contained in the plaintiff's prayers. But upon a careful consideration of the evidence, the court can come to no such opinion as matter of fact. Instead of a purchase of stocks, in the ordinary sense of that term, the court finds the transaction between the parties to have been a fair and bona-fide compromise of a case in which the plaintiff, finding itself subject to a claim for $55,000, founded upon a transaction admitted in the argument to have been a legitimate banking transaction, thought it expedient to reduce an apprehended loss by a compromise in which it acquired the stocks in question. That a national bank has a right under such circumstances to save itself from loss through the medium of an arrangement by which it shall receive stock, to be again turned into money, to avert or diminish an apprehended loss, and not for investment or speculation, the court does not doubt; and believing from the evidence this to have been such a transaction, it now enters a verdict for the defendant, and orders a judgment to be entered thereon according to the course of the court.

GEORGE W. DOBBIN.

To which action of the court in the premises, to its decision with regard to said prayers, to the endorsement thereon, to the opinion and order of the court aforesaid, to the whole of said proceedings, and to every part thereof, the plaintiff, by its counsel, excepts; and to the said opinion further excepts, especially upon the ground that there is no evidence in the cause of such an arrangement as is therein mentioned; and prays the court to sign and seal this his first bill of exceptions; which is accordingly done this twelfth day of May, 1873.

GEORGE W. DOBBIN. [SEAL.]

After the happening of the matters and things, and the giving of the testimony in the plaintiff's first bill of exceptions mentioned, which is hereby referred to and made part hereof, on the 8th day of March, 1873, the plaintiff tendered to the court certain exceptions to be signed and sealed; and thereupon the said court, being informed that the plaintiff had excepted to its failure to call the said plaintiff for the purpose of allowing it to suffer a non pros., should it be so advised, passed the following order to re-open the cause and to strike out the judgment, verdict, and opinion aforesaid, for the purpose of calling the said plaintiff.

In the superior court.

THE FIRST NATIONAL BANK OF CHARLOTTE
vs.
THE NATIONAL EXCHANGE BANK OF BALTIMORE.

28 The court having learned from the counsel for the plaintiff that they consider themselves aggrieved by the omission on the part of the court to have the plaintiff formally called, in order to afford it the opportunity to enter a non pros. if it had so desired, deems it proper to afford the opportunity so alleged to have been omitted. This case was submitted to the court to be decided without the aid of a jury. The whole evidence in the cause, oral and documentary, was heard by the court, and at the close of the testimony four prayers were submitted by the counsel for the plaintiff, and none by the counsel for the defendant. The case was then elaborately argued by counsel upon both sides, as is usual in such submissions upon the law and the facts, and the case held under advisement. While thus sub curia, the counsel for the plaintiff informed the court that they had been under an error as to the scope of the argument already addressed to the court, and supposed it to be an argument only upon the law, and that a further opportunity would be allowed them to discuss the facts. The court then explained to them that the practice was to have but one argument in such cases, but as the counsel stated that they were in ignorance of this practice, the court would be willing to hear them further upon the facts, and a further full argument was accordingly made. Upon this the case was again submitted to the court, certainly under the belief on the part of the court that nothing remained to be done but for the court to consider and decide the case. It is therefore with surprise that the court learns that the plaintiff's counsel think that the rights of their client have been disregarded, and has no other mode of redressing the alleged grievance but to revoke its own action, and give them the opportunity to non pros. their case, which they say was heretofore lost to them. The court, therefore, now, on this eighth day of March, 1873, orders the clerk to strike out the opinion, verdict, and judgment heretofore, on the third day of February, 1873, entered in this cause, and to call the plaintiff on Saturday, March 15th, instant, after which the court will further proceed in the cause.

GEORGE W. DOBBIN.

To which order of the said court, passed for the purpose aforesaid, said plaintiff excepted, and prays the court to sign and seal this his second bill of exceptions; which is accordingly done this 12th day of May, 1873.

GEORGE W. DOBBIN. [SEAL.]

After the happening of the matters and things, and the giving of the testimony in the plaintiff's first and second bills of exceptions mentioned, which are hereby referred to and incorporated as part hereof, and on the 15th day of March, 1873, when the cause was again called up, the plaintiff, by counsel, filed the following motion:

In the superior court of Baltimore City.

THE FIRST NATIONAL BANK OF CHARLOTTE
vs.
THE NATIONAL EXCHANGE BANK.

The plaintiff, by counsel, prays the court to order a new trial in the above-entitled cause, because the judgment and verdict therein having been vacated by the order of the court passed on the eighth day of March, 1873, no judgment can be entered except by another trial had in the due course of legal proceedings.

And because the above order is equivalent in law to granting a new trial.

DENNIS & SCOTT,
Attorneys for Plaintiff.

Which was overruled.

29 To which action of the court, in overruling the same, the said plaintiff, by counsel, excepts, and prays the court to sign and seal this his third bill of exceptions; which is accordingly done this 12th day of May, 1873.

GEO. W. DOBBIN. [SEAL.]

After the giving of the testimony and the happening of the matters and things in the plaintiff's first, second, and third bill of exceptions mentioned, which are hereby referred to and incorporated as part hereof, on the said 15th day of March, the said plaintiff was called, and upon its responding to the call, the said court made the following decision, opinion, and order:

The law of these prayers, 1, 2, 3, and 4, is granted by the court, but, upon the hypothesis of fact, the court finds a verdict for the defendant.

The court disposes of the foregoing motion by overruling the same. The verdict and judgment were removed as an obstacle in the way of the plaintiff's opportunity to enter a non pros, the plaintiff having denied that it had the proper opportunity to make such entry, whilst the court, on the other hand, acted under the belief that the case had been submitted for decision under such circumstances as amounted to a waiver of the mere formality of calling the plaintiff. That view having been denied by the counsel for the plaintiff, the court passed the order of the 8th March, '73, as the only mode left to give them that opportunity. By this course of procedure no injustice whatever has been done to the plaintiff, because it has been afforded the opportunity to non pros its case after it knew what would be the finding of the court, both upon the law and the facts. A new trial is never awarded except where some injustice has been in fact done, or might have been done, in the former trial. None of the usual grounds for new trial are alleged or pretended in this case, and the defendant, in whose favor the verdict and judgment were, has not objected to the action of the court. Whatever formal irregularity, therefore, may have occurred, (though not so considered as matter of fact by the court,) has been repaired in favor of the

plaintiff by the order of the 8th of March, and no injustice, actual or possible, has been done, as shown by the answering of the plaintiff; the present motion is overruled, and the plaintiff having been called and answered, the opinion, verdict, and judgment as rendered on the third Feby., 1873, are now ordered to be entered anew.

GEORGE W. DOBBIN.

15 MARCH, 1873.

To which action of the court in making said decision, and in re-entering the said opinion, to the opinion itself, and to the entering up of the verdict, under the circumstances aforesaid, the said plaintiff, by counsel, excepts; and further excepts specially to the said opinion, because there was no evidence in the cause of such an arrangement as is thereinmentioned; and prays the court to sign and seal this his fourth bill of exceptions; which is accordingly done this 12th day of May, 1873.

GEORGE W. DOBBIN. [SEAL.]

Appellant's costs	$55 75
Appellee's "	7 40

STATE OF MARYLAND,
City of Baltimore, sct:

I, George Robinson, clerk of the superior court of Baltimore City,
30 do hereby certify that the aforegoing is a true transcript, taken from the record and proceedings of the said court in the therein, entitled cause, and made according to the rules prescribed by the court of appeals.

In testimony whereof I hereunto set my hand and affix the seal of the superior court of Baltimore City aforesaid on this twenty-seventh day of September, eighteen hundred and seventy-two.

[SEAL'S PLACE.] GEO. ROBINSON, *Clerk.*

31 And now come into the court of appeals here as well the said the first National Bank of Charlotte, by J. Upshur Dennis and John Scott, esquires, its attorn*ies*, as the said The National Exchange Bank of Baltimore, by J. Newell Steele and William F. Frick, esquires, its attorneys, and thereupon, on motion of the said The National Exchange Bank of Baltimore, by its attorneys aforesaid, it is ruled by the court here that the said The First National Bank of Charlotte assign the errors in the record of proceedings aforesaid, in the judgement aforesaid, so as aforesaid brought before the court of appeals here for correcting the errors supposed to be therein, or judgmen tby the court of appeals here will be entered against it in default thereof, and the said The First National Bank
32 of Charlotte, by its attorneys aforesaid, say that in the record of proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in the plea aforesaid given was given for the said The National Exchange Bank of Baltimore against the said First National Bank of Charlotte, when by the law of the land that judgment ought to have been given for the said The First National Bank of Charlotte against the said The National Exchange Bank of Baltimcre; therefore in that there is manifest error; and it prays that the judgment aforesaid, for that error and others being in the record of proceedings aforesaid, may be reversed, annulled, and held entirely as void, and that it, the said The First National Bank of Charlotte, may

be restored to all things which it hath lost by occasion of the
33 said judgment, and that the said The National Exchange Bank of Baltimore may rejoin to the errors aforesaid, and so forth. And thereupon it is ruled by the court of appeals here that the said The National Exchange Bank of Baltimore join in the errors by the said The First National Bank of *Baltimore*, above assigned in the record of proceedings aforesaid, or judgment by the court of appeals here will be rendered against it in default thereof; and the said The National Exchange Bank of Baltimore, by its attorneys aforesaid, say there is no error in the record of proceedings aforesaid, nor in the giving of the judgment aforesaid, and it prays that the court of appeals here will proceed to the examination as well of the record of proceedings aforesaid as of
34 the matters aforesaid, by the said The First National Bank of Charlotte above for error assigned, and that the said judgment may be in all things affirmed, and so forth. Thereupon further process of and upon the premises between the parties aforesaid is, by virtue of an act of assembly in such cases made and provided, continued before the court of appeals here until the first Monday in October next. The same day is given to the said parties there then to hear the judgment of the court of appeals here of and upon the said premises, and so forth.

And now at this day, to wit, the said first Monday in October, being the sixth day of the said month, in the year of our Lord one thousand eight hundred and seventy-three, come again into the court of
35 appeals here the parties aforesaid, by their attorneys aforesaid, whereupon as well the record and proceedings aforesaid and the judgment given in form aforesaid as the matters aforesaid by the said The First National Bank of Charlotte above for error assigned being seen, and by the court of appeals here fully understood, and mature deliberation thereupon had, for that it appears to the court of appeals here that there is no error in the record of proceedings aforesaid, nor in the giving of the judgment aforesaid, therefore, it is considered by the court of appeals here that the judgment aforesaid, given in form aforesaid, be in all things affirmed, and stand in full force and effect, the said causes for error above assigned and alleged in anywise notwithstanding. And it is further considered by the court of ap-
36 peals here that the said The National Exchange Bank of Baltimore have execution against the said The First National Bank of Charlotte, as well for the costs and charges aforesaid, adjudged unto it in the said superior court of Baltimore City, as also the sum of seventy-five dollars and forty-five cents, adjudged unto the said The National Exchange Bank of Baltimore by the court of appeals here on its assent for its costs and charges which it had sustained by occasion of the delay of the execution of the judgment aforesaid, by pretext of the prosecution of the said appeal by the said The First National Bank of Charlotte for the correcting of errors of and upon the premises as aforesaid, prosecuted, &c.

MEMORANDUM.

Judgment was affirmed in this case on the third day of March,
37 1874, and execution awarded for the sum of seven dollars and forty cents costs in the superior court of Baltimore City, and also the sum of seventy-five dollars and costs in the court of appeals of Maryland.

JAMES S. FRANKLIN, *Clerk.*

On the third day of March, 1874, the court of appeals filed the following opinion, to wit:

38 THE FIRST NATIONAL BANK OF CHARLOTTE
vs.
THE NATIONAL EXCHANGE BANK OF BALTIMORE.

ROBINSON, *Judge:*

The plaintiff below, a national bank in Charlotte, North Carolina, desiring to increase its capital stock, and for that purpose to deposit with the proper Department at Washington $50,000 in United States bonds, employed Bayne & Co., of Baltimore, as its agent, to procure and deliver them at Washington. Not having money to pay for them at the time, the plaintiff sent its president, Wilkes, to Baltimore, with a certificate, previously prepared in Charlotte, as follows:

39 "FIRST NATIONAL BANK OF
"CHARLOTTE, NORTH CAROLINA,
"*Charlotte, December 15th*, 1865.

"Received on deposit, from Bayne & Co., fifty-five thousand U. S. 5-20 bds., 3d issue, payable to the order of themselves, on return of this certificate.

"JOHN WILKES,
"*President 1st Nat. Bk. Charlotte, N. C.*"

This certificate was delivered by Wilkes, president, to Bayne & Co., in Baltimore, and on the 18th of December, 1865, Bayne & Co., having endorsed the same, deposited it, together with other securities, with the defendant below, a national bank in Baltimore, as collateral security for a call-loan of $80,000, then made by that bank to said firm of Bayne & Co.

A few days after the delivery of said certificate the plaintiff
40 deposited in New York, to the credit of Bayne & Co., a sum sufficient to pay the same, and received in January, 1856, verbal notice from Bayne and Co. that the certificate was discharged and subject to plaintiff's order. In March, 1856, the plaintiff received a written notice to the same effect, but it did not apply for its surrender. In April following Bayne & Co. failed, and the plaintiff was then notified by the defendant that it held the certificate of deposit for value, and demanded the delivery of the bonds therein mentioned.

Wilkes, the president, was sent by the plaintiff to Baltimore to negotiate for the return of said certificate. He informed the defendant that it had been satisfied by the payment to Bayne & Co., and disavowed
41 any legal liability on account of same to the defendant. To avoid suit, however, Wilkes offered to pay $5,000 upon the delivery of the certificate, which defendant refused, but offered to take $20,000, and threatened suit unless so settled. Wilkes declined to pay this sum, but asked for delay until he could return to Charlotte and consult his directors. He returned again to Baltimore, and new negotiations for compromise of the controversy existing between the two banks in regard to their respective rights to the certificate were opened. Wilkes ascertained that the defendant held, among its collaterals from Bayne & Co., a large number of shares of Washington, Alexandria and George-

town R. R. stocks, the market-value of which had been seriously depressed by the failure of Bayne & Co. Having informed himself in regard to the condition of the stock and its supposed value, and
42 after one or two interviews between him and the president and directors of the defendant, it was finally agreed that the plaintiff should take 400 shares of the Washington, Alexandria and Georgetown R. stock, 1,000 shares of the Maryland Anthracite stock, the same being valued at $40,000, and 125 shares of the plaintiff's own stock, valued at $15,000, the latter to be taken by Wilkes himself, inasmuch as he was advised that a national bank could not buy its own stock, thus making $55,000. Upon the basis of this settlement the defendant was to deliver up to Wilkes the certificate held by it for the $55,000 U. S. bonds. The plaintiff paid to the defendant the sum of $40,000, according to the terms of the above settlement, and received the certificates for
43 1,000 shares coal stock. The 400 shares of railroad stock were not then delivered, there being a suit about it at the time of the agreement which prevented all transfers, but it was regarded and treated by both parties as belonging to the plaintiff.

In September, 1869, nearly three years after the date of the above settlement, this suit is brought by the plaintiff, to recover from the defendant the $40,000 paid by it in pursuance of the arrangement above stated. The case, by agreement, was twice before the court, and the plaintiff asked the granting of four propositions of law to govern the court in deciding upon the facts. The first proposition is to the effect that if the plaintiff agreed to purchase for $40,000 the R. R. and
44 coal stock, and paid that sum, then the court must find for the plaintiff for that amount, provided the court shall further find that the defendant knew the plaintiff to be a national bank, and although the court shall further find that the certificate of deposit was delivered up in consequence of said contract, if by said contract no part of the $40,000 was to be paid for the certificate.

Second. That if the plaintiff agreed to purchase the said stock for $40,000, and Wilkes also agreed to purchase for $15,000 125 shares of plaintiff's stock, and the inducement to both agreements was Wilkes' desire to obtain the certificate of deposit, and he did so obtain it, that does not enure to make the first contract valid, provided the court
45 shall find that by the first-mentioned contract the consideration for which the sum of $40,000 was to be paid was the railroad and coal stock, and that no part of said sum was to be paid for the certificate of deposit.

Thirdly. That if the plaintiff, in order to compromise the certificate of deposit, agreed to purchase it and the railroad and coal stock for $40,000, and paid the money, then the plaintiff is entitled to recover so much of said sum as the court shall find was paid for said stock.

Fourth. That if there was an agreement for purchase as stated in the third prayer and it was executed, the effect of the letter of de-
46 fendant's counsel of August 16th, 1869, was to waive all tender of what was received by the plaintiff under said purchase, and the plaintiff is entitled to recover back the $40,000 if the court shall find that the defendant was not prejudiced by the plaintiff's delay to rescind the contract, and that the same was done in a reasonable time.

The plaintiff's prayers embracing these propositions of law were granted, but upon the facts the court found a verdict for the defendant.

In the written opinion filed in the case the court admits the general proposition of law contended for by the plaintiff, that a national bank has no power to purchase stocks, either for speculation or investment, to be true, but says:

47 "Instead of the purchase of stocks, in the ordinary sense of that term, the court finds the transaction between the parties to have been a fair and bona fide compromise of a case in which the plaintiff, finding itself subject to a claim for $55,000, founded upon a transaction admitted in the argument to have been a legitimate banking transaction, thought it expedient to reduce an apprehended loss by a compromise, in which it acquired the stocks in question. That a national bank has a right, under such circumstances, to save itself from loss through the medium of an arrangement by which it shall receive stock, to be again turned into money, to avert or diminish an apprehended loss, and not for investment or speculation, the court does not doubt, and believing from the evidence this to have been such a transaction,
48 it now enters a verdict for the defendant, and orders a judgment to be entered thereon according to the course of the court."

To the opinion and order of the court, and to its action in the premises, the plaintiff excepted. It is contended, in support of this exception, that the judge, after stating his conclusion upon the facts, decided as matter of law that a national bank under such circumstances had the right to receive stocks, to be again turned into money, to save itself from an apprehended loss, and that this court has the right, in all cases tried before a judge without the intervention of a jury, to review any proposition of law which appears from the opinion of the judge to have
49 been decided below, and which may have influenced him in the rendition of the verdict. Conceding this view to be correct for the purposes of this case, without, however, so deciding, we concur with the court below in regard to the proposition of law thus announced. If instead of purchasing the stocks in question for speculation or as an investment, the plaintiff acquired them by way of a compromise of a claim of $95,000 alleged to be due the defendant, and for the purpose of averting an apprehended loss on account of said claim, there is nothing either in the letter or spirit of the banking act to prevent, under such circumstances, a transfer of the stocks of the plaintiff. Whether a national bank can take a mortgage on real estate to secure the payment of future loans is a question which does not arise in this case, and in regard
50 to which we express no opinion. (Fowler et al. vs. J. D. Scully, in trust for 1st National Bank of Pittsburg, Pittsburgh Legal Journal, Jany. 22d, 1873.)

It appears from the statement of the court that it had been led to suppose from the submission of the case, after argument on the law and the facts by both parties, that the plaintiff's attorney had waived their right to have the plaintiff called before the verdict was entered, and being informed by them, after the decision of the case and entry of verdict and judgment, that they did not receive but claimed that right, the court struck out the entry of verdict and judgment, in order to give them an opportunity to non pros the case. The plaintiff, however, when called, answered, and thus refused to have a non pros
51 entered; whereupon the court entered the verdict and judgment thereupon as before. To the striking out of the verdict and the judgment under the circumstances, and the refusal of the court to grant a new trial, and to the entry of the verdict and the judgment anew, the plaintiff excepted.

We see no just ground of complaint on the part of the plaintiff to the action of the court in premises. The verdict and judgment were stricken out because the plaintiff had complained that they had been denied the right of having a non pros entered in the case, and when

the opportunity was offered them they refused to avail themselves of the privilege, and answered to the call of the case. By this procedure on the part of the court, no injustice was done to the plaintiff.
52 It had not the right of having a non pros entered, but the privilege of exercising this right, with full knowledge of what the verdict would be. Entertaining these views, the judgment below will be affirmed.

Judgment affirmed.

Decided 3 March, 1874.

MARYLAND, *sct:*

I, James S. Franklin, clerk of the court of appeals of Maryland, do hereby certify that the aforegoing is truly taken from the record and proceedings of the said court of appeals.

In testimony whereof I hereto set my hand as clerk and affix
53 the seal of the said court of appeals this 24th day of April, anno Domini 1874.

JAMES S. FRANKLIN, [SEAL.]
Clerk Court of Appeals of Md.

(Indorsement on cover:) No. 193. The First National Bank of Charlotte, plaintiff in error, vs. The National Exchange Bank of Baltimore. Maryland ct. of appeals. Filed 25th June, 1874.

Supreme Court of the United States,

October Term 1875.

No. 193.

THE FIRST NATIONAL BANK OF CHARLOTTE,

Plaintiff in Error,

vs.

The National Exchange Bank of Baltimore,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

J. UPSHUR DENNIS,
JOHN SCOTT, JR.,
For Plaintiff in Error.

Supreme Court of the United States,

October Term 1875.

No. 193.

THE FIRST NATIONAL BANK OF CHARLOTTE,

Plaintiff in Error,

vs.

The National Exchange Bank of Baltimore,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This case comes up on a Writ of Error to the Court of Appeals of Maryland, allowed by the Chief Judge of that tribunal, (Record p. 1,) and belongs to the third class of cases over which the revisory jurisdiction of the Supreme Court is asserted in Trebilcock vs. Wilson, (12 Wallace, 692, 693.) The controversy arose upon the construction of the National Banking Act of 1864, and the point in dispute is whether a National Bank is permitted to purchase Railroad or other stocks for the purpose of making a profit by their resale.

The Court of Appeals decided, that the stocks in question were purchased by the Bank in order to be sold again; that,

ordinarily, such a purchase is not permitted by the Act of Congress and is consequently *ultra vires* and void; (Record, pp. 23, 24,) but the validity of the transactions in this particular case was maintained, because the profit expected to be made on their resale was to be applied towards replacing the money paid to the vendor of the stocks over and above their known market value in order to compromise a claim that he held against the Bank.

The defendant in error asserted a claim against the plaintiff in error, for which it asked $20,000 but was willing to compromise for $10,000. The plaintiff purchased from it, for $40,000 stocks worth in the market only about $30,000, and the defendant thereupon cancelled the disputed claim. The stocks were bought to be resold with the intention of making by their resale a sufficient sum over $30,000 as would diminish the $10,000 paid on account of the claim, or replace it altogether. This intent, entertained at the time, and operating as a motive to the purchase, the Court decided rendered the transaction one authorized by the Act of Congress and prevented it from being held illegal. That this is a correct statement of the distinction drawn by the Court of Appeals of Maryland will appear from a review of the facts.

The plaintiff in error was a National Bank in Charlotte, N. Carolina, organized in 1865 under the National Banking Act of 1864, and was carrying on an unusually thriving business (Record p. 10, top of page.) Being desirous of increasing its circulation, its President, John Wilkes, came to Baltimore in December 1865, and employed the brokers' firm of L. P. Bayne & Co., to purchase $55,000 in U. S. registered bonds, to be deposited with the Comptroller of the Currency as the basis for an additional issue of notes. Bayne & Co., consented to purchase the bonds, but declined to take in payment certain drafts which the Bank held on New York parties. It was therefore agreed that Wilkes should give Bayne & Co., a *non-negotiable certificate of deposit of bonds*, with the further express agreement (page 7,) that it was not to be assigned; that Bayne & Co, should deliver the bonds in Wash-

ington; and that Wilkes should go to New York, collect the drafts and liquidate the certificate of deposit by placing the required amount to the credit of Bayne & Co., in that city.

The bonds were accordingly delivered, and Wilkes made the deposits in New York as agreed, discharging the certificate about December 20th 1865. By January 1st 1866, the plaintiff had a balance to its credit with Bayne & Co., of several thousand dollars, and during that winter received oral and written assurances that the certificate was satisfied and would be delivered whenever it was demanded. In the spring following, however, the plaintiff was notified by the defendant in error, also a National Bank, that this certificate was in its hands.

It turned out, that, in fraud of his agreement, Bayne had assigned, on December 18th 1865, this certificate along with other collaterals to the defendant, as security for loans made by the latter in violation of the 29th section of the Banking Act; and that, upon the failure of Bayne & Co., the defendant, whose entire capital amounted to only $600,000, was the creditor of that firm for between $300,000 and $400,000 with nothing to look to except this certificate, and a quantity of stocks of various kinds, received in the course of transactions expressly prohibited by the Act of Congress, (pages 13 & 9.)

The plaintiff disclaimed, of course, all liability on the certificate, as it was non-negotiable and had been discharged before notice of the assignment; but on being threatened with suit by the defendant's counsel, who had been sent to Charlotte (page 12,) the plaintiff's President came to Baltimore to attempt some amicable settlement of the matter. The defendant's officers discovered that a suit would materially derange the plaintiff's intention of still further increasing its capital stock and circulation, as was then contemplated, (page 12,) and asked $20,000 for the certificate, (page 9.) The plaintiff offered $5,000 for peace. After some time had elapsed in negotiations, the plaintiff's President agreed to aid the defendant in reducing its claim against Bayne & Co.,

by purchasing for the plaintiff certain of the Railroad and other stocks obtained from that firm, for $40,000, the stocks being then much depressed by Bayne & Co's. failure and not worth more than $30,000. The evidence on both sides (pages 9 & 14) was, that the plaintiff, throughout the negotiations, refused to acknowledge any liability on account of the certificate and that finally it was expressly agreed that the money *should be paid on the stock alone.* The Judge to whom the facts were submitted, found however, that the giving up of the certificate was the *inducement* to the purchase, and that the contract was one in which it was intended at the time that the plaintiff should resell the stocks in order to obtain as much more than the $30,000 which they were then worth, as would, to use his words, "diminish or avert the loss which it apprehended" from the $10,000 actually paid for the certificate (Record p. 17.)

The money was duly paid, in instalments, out of the plaintiff's funds to the defendant; but only a small portion of the stock has been transferred owing to a litigation which was then pending. About a year after the last instalment of the $40,000 had been paid, there was a change in the management of the plaintiff, and Wilkes ceased to be a Director. The plaintiff then repudiated the transaction, as void and unauthorized under its charter, and claimed that its funds had been paid to the defendant by unauthorized agents, of whose want of power the defendant had ample notice. The defendant refused to return the money on any grounds, and the plaintiff brought suit.

At the time of the trial the plaintiff's counsel tendered the defendant so much of the stock as had come to its possession under the arrangement, and all dividends and interest received thereon as well as the non-negotiable certificate of deposit, offering to waive the defense of limitations in the event of a suit on the latter. The plaintiff's case did not proceed on any theory of a rescission of a contract, but on the idea that no *contract had ever been made,* since the arrangement attempted was void as *ultra vires.* The offer above mentioned

was intended to show the equitable position of the plaintiff, and to make plain that the defendant was all along aware that it had no valid claim on the certificate of deposit but had used its possession of it solely to force the plaintiff into a hard and illegal transaction.

The case was submitted to the Court without the aid of a jury, and, after the evidence had been closed, the plaintiff offered four propositions of law, (pages 15 & 16,) with the intention of covering every possible view of the case. As stated in the opinion of the Court of Appeals of Maryland they are as follows (p. 23.)

First. If the plaintiff agreed to purchase for $40,000 the Rail Road and Coal Stock and paid that sum, the Court must find for the plaintiff, although the certificate was delivered up in consequence of said contract, if by the contract no part of the $40,000 was to be paid for the certificate.

Second. The second instruction embodies the same principle.

Third. That if the plaintiff, in order to compromise the certificate of deposit, agreed to purchase it and the stock for $40,000, then the plaintiff is entitled to recover so much of said sum as the Court shall find was paid for the stock.

Fourth. That the effect of the letter of the defendant's counsel dated August 16th 1869, was to waive all tender of what was received by the plaintiff under the purchase, and the plaintiff is entitled to recover the $40,000, if the Court shall find that the defendant was not prejudiced by the plaintiff's delay to rescind the contract, and that the same was done in a reasonable time.

These propositions were all granted by the Court, who, however, distinguished the case in its written opinion embodying both the law and the facts. After stating that a National Bank had no power under the Act of Congress to purchase stocks either for investment or speculation, the Court went on to say that this transaction was one in which the

plaintiff found it expedient to compromise the certificate by acquiring for money the stock in question to be turned again into money, in order to avert or diminish an apprehended loss: that a National Bank has such a power the Court does not doubt, and finding this to be such a transaction it enters a verdict for the defendant, (Record, p. 17.)

The opinion states, prominently, that the stock was acquired for money to be again turned into money, or in other words, *for speculation;* and that this purpose formed a part of the contract. This, it decides, is in general, unauthorized under the Act of Congress; but was rendered legal in this case by the circumstance, that the inducement to the arrangement was the settlement of a contested claim, and because the plaintiff intended to apply the profit obtained by a resale of the stocks to reimburse itself for the amount which it had paid over and above their value in order to obtain possession of the liquidated certificate. This decision was affirmed by the Court of Appeals of Maryland (p. 35), and constitutes the only point decided in that tribunal. The Federal question is therefore distinctly and exclusively presented.

ASSIGNMENT OF ERRORS.

The plaintiff in error consequently assigns as error in the judgment of the Court of Appeals of Maryland:

1. That the said Court erred in affirming the proposition decided by the lower Court and enunciated as follows:— "Instead of a purchase of stocks in the ordinary sense of the term, the Court finds the transaction between the parties to have been a *bona fide* compromise of a case in which the plaintiff finding itself subject to a claim for $55000, founded upon a transaction admitted in the argument to have been a legitimate banking transaction, thought it expedient to reduce an apprehended loss by a compromise in which it acquired the stocks in question. That a National bank has a right under such circumstances to save itself from loss through

the medium of an arrangement by which it shall receive stock to be again turned into money to avert or diminish an apprehended loss, and not for investment or speculation, the Court does not doubt; and believing from the evidence this to have been such a transaction, it now enters a verdict for the defendant and orders a judgment to be entered thereon according to the course of the Court."

2. That the said Court erred in determining, that, under the Constitution and Laws of the United States, especially the Act of Congress, entitled "An Act to provide a National currency, secured by a pledge of United States Bonds, and to provide for the circulation and redemption thereof" approved June 3d 1864, the plaintiff in error had authority to acquire "the stocks before mentioned, for money to be again turned into money in order to avert or diminish an apprehended loss" on account of the claim under the certificate of deposit of bonds.

3. That the said Court erred in determining, that under the said Constitution and Laws of the United States the plaintiff in error was not entitled to recover the amount paid out of its funds for the stock before mentioned to the defendant in error, even though the object of the acquirement of the stocks was to turn them into money to avert or diminish an apprehended loss and to compromise the claim which was being urged against it.

4. That the said Court erred in not deciding that the plaintiff in error should have judgment for the sum of $42,362,68, together with such interest as the Court should see fit in its discretion to award, the said sum having been paid out of the funds of the plaintiff in error to the defendant in error for stocks, with the view to turn them again into money, the said defendant having full notice of the illegality of the contract.

POINTS.

The question for this Court to determine is the validity of the transaction, and this depends necessarily on the construction of the Act of Congress, commonly known as the National Banking Law. This Act was passed in 1863, was carefully remodelled in 1864, (ch. 106), with many changes, and has been since the subject of much discussion and amendment. It contributed more, perhaps, than any other measure to the credit and success of the Government during the late Civil War, and now affects almost the entire Banking Capital of the United States as well as all Commercial dealings through out its wide limits. It is one of the most important Acts that Congress has ever passed, and was carefully framed to retain all the good features of the New York Banking Law of 1838, with such additional provisions as would supply the deficiencies of that statute and avoid the objections, to which experience had shown it liable. The Act is lengthy, elaborate, minute and specific, and shows to the most superficial perusal that every provision was most carefully conned and considered. The eighth section contains the grant of powers, and provides, that, after a National Bank is duly organized, it "*may under this Act exercise all such incidental powers as shall be necessary to carry on the business of Banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this Act.*"

This section enumerates, as all the cases hold, the powers which a National Bank can exercise, and is a pledge to the stockholders that their funds shall not be imperilled in any other modes than those pointed out. But whatever were the reasons of its enactment, it is at this day elementary law, that the powers of all corporations formed under the provisions of any statute depend on the construction of the words employed in the enactment. A corporation has only the powers which are expressly granted by the law creating it

and such others as are *necessarily* incidental to those which are designated. Beyond the scope of its grant, every other power is as much denied, as if it was in terms prohibited and a penalty attached to its exercise.

Pearce vs. Mad. & Ind. R. R., 21 Howard, 442 &c.
Bank of Augusta vs. Earle, 13 Peters on p. 587.
Perrine vs. Ches. & Del. Canal Co., 9 Howard 184.
Penn., Del. & Md. Steam Nav. Co., 8 G. & J., 319.

It follows necessarily, that so much of the decision appealed from as states that National Banks have in general no power to give their money for stocks is beyond controversy, No clause in the act allows such dealings, and, besides the absence of all provisions *permitting* operations of that kind, excludes them under the well known rule of *expressio unius exclusio alterius,* the legal presumption of intentional omission is raised to actual certainty when the Banks are expressly empowered to purchase *exchange, coin* and *bullion.* In the New York Act Banks were directed to purchase stocks to deposit with the Comptroller as security for their issue, and for certain prescribed purposes such purchases were therefore authorized. But by the Act of Congress U. S. Bonds were substituted for stocks, and there is no clause of any sort in the statute looking to the use of stocks for any purpose whatever.

II. Granting now that the power to buy stocks was not given, on what grounds is it to be implied in this case? The opinion appealed from announces that it may be implied when it is induced by an agreement to settle a claim, and that a contract unauthorized by itself is rendered legal, if its motive and operating cause be a matter about which the corporation can legally agree.

Your Honors will observe that the facts found by the Judge of the Superior Court in his opinion (Record, p. 17,) negative the idea that there was any contract to pay money for the contested claim on the certificate. The plaintiff in error offered an instruction based on the hypothesis that the money

was paid by way of compromise for the claim and the stocks together, (plaintiff's third prayer pp. 16 & 23.) This the Court granted but expressly declared (pp. 17 & 23,) by its verdict that this assumption was incorrect, and that the money was paid wholly for the stocks. The distinction between the plaintiff's third prayer, whose hypothesis of facts was thus negatived, and the Court's opinion which states the facts that actually were found, is grounded on the idea that a contract for the abandonment of a claim, provided a further independent contract of purchase of stocks is entered into, is altogether different from a contract to purchase, by way of compromise, the stocks and the claim together. The principle of this distinction, although refined, has unquestionably been upheld in England and by this Court on no less than two occasions. But the decision of the Maryland Court, while concurring with this tribunal as to the existence of such a distinction, overrules the decisions of this Court on the proposition that the validity of the second contract must stand on its own independent merits unaffected by the one for which it served as the consideration.

Philpot vs. Gruninger, 14 Wallace, 574 & 577.
Legal Tender Cases, 12 Wallace, on p. 548.
B. & O. R. R. vs. State, 36 Maryland, on p. 542.

In the case first above cited this Court decided, that if A. who urges a claim against B. which B. disputes, says to B. "I will agree to perform something which you request provided you give me a note for the claim, and such an agreement is made, yet the performance or non-performance of the contemporaneous promise that induced the note *had no effect on the contract of the note itself.* If not rendered invalid by the other agreement the note of course could not be made valid. It must depend on its own merits for good or evil. This Court decided in effect that such a note was an entire contract possessing every essential element of an agreement, viz: two parties and a consideration on both sides, and must

be determined independently of the other. This ruling covers the very case appealed from here. The judge of the Superior Court to whom the facts were submitted, decided, that, as the inducement for the promise to abandon the disputed certificate, a further contract to acquire the stocks for money was entered into. This last is an entire contract embracing two parties and a consideration rendered or attempted by each, viz : stocks by one party and money by the other ; and, upon the principle in Philpot vs. Gruninger, must be decided on its separate merits. If it be void, the consideration for the abandonment of the claim may, perhaps, have failed, and the defendant may demand the certificate and bring trover. The lower Court held that, regarded separately, the purchase of the stocks was *ultra vires* and the plaintiff was entitled to recover, and by refusing relief solely because the contract of such purchase was blended with another agreement, overruled the decision by this Court in Philpot vs. Gruninger, which declared that the contract of purchase must be adjudged as if it stood alone.

II. But even conceding that the two agreements may be inseparably united, we insist that it is error to hold a power to *acquire* stocks to be incidental to the right to avoid payment of a claim; or that, under the power to discharge by way of compromise, the plaintiff can take anything from the defendant but the disputed claim itself. Corporations are confessedly restricted to powers expressly granted and to such as are *necessary* to carry those into execution. A party urges a demand against the corporation which the latter has the legal right to pay. A discharge consists in the passing of property of some kind to the party who holds the demand, and, as incident to that power, the alleged debtor might pay less than the face value of the debt or transfer other property than money. Every dealing of this kind would be by way of accord and satisfaction of the claim, involving a transfer of property exclusively by the debtor to the creditor, and all that the debtor would receive would be the title to the claim thus liquidated. The latter would *incur no new indebtedness*, but

would relieve itself from one already contracted. Anything further is more than a discharge; transcends the limits of necessary powers, and enables a corporation to accomplish indirectly that which was intended to be prohibited to it.

The error in the ruling of the Maryland Court of Appeals comes from implying a power in order to carry out one expressly granted, and then erecting that implied power into *an end* and implying everything as incident thereto which may help to attain it. In many cases doubtless a power to buy would be a desirable mode of freeing oneself from a claim; and a Bank might relieve itself from suit by purchasing from its creditor property which it might be that creditor's advantage to part with. In this way it could acquire a hotel, purchase a controlling interest in a rail road, obtain grain, or cotton, or iron or any one of the numerous kinds of property which the owner had not sufficient means to make available. The contract would often be mutually advantageous, and the power would be incidental to the right to compromise in so far that it had actually proved an expedient mode of discharging the claims.

In like manner it might be said that a corporation had, as incident to the power to discharge its indebtedness, the right to acquire funds for that purpose; in order to acquire such funds, it should have, upon the same principle, the privilege of engaging in any sort of business, provided its real and *bona fide* object was to accumulate funds to answer the calls of its creditors. But it is evident that such a line of argument would sweep away every restriction of a charter, and give these creatures of statute every power which is not in terms prohibited to them.

The correct doctrine is, that a power, implied in order to carry out one specifically named, must tend *naturally* towards accomplishing the one in view, and be such as could reasonably have been in the contemplation of the framers of the charter. The incident being given solely as a means of attaining a designated purpose, cannot operate as the grant of a new and substantive power, (4 Peters, p. 169.) It is legal only

as being deducible from the grant and fairly included within its scope. The incident must necessarily partake of the same character as the power to which it is incidental and cannot be of greater dimensions. A power to buy confers nothing beyond a right to acquire; a power to discharge may embrace a payment of any kind whatever, but does not include a purchase or acquisition which is a right of an entirely different nature.

This question has come up in different forms both in this Court and the appellate tribunals of various states. Corporations, confessedly possessing power to attain certain objects as a means of executing granted rights, have made contracts outside of the line of their grants in order to accomplish the incidental objects. It was urged, that these contracts advanced purposes which it was admitted the corporations could legally attain under their charters, and also benefited the public; nay that without them the Corporations would be of little service to the state. Had the implied power to perform an act which would lead to the accomplishment of a definite end been itself treated as an end to be attained, and all means of promoting it inferred as incidental, there is no question but that these arrangements were valid. In every case, however, they were held *ultra vires* and void, because, although an *advantageous*, they were yet not a *necessary* means of executing the powers actually granted.

Pearce vs. Madison & Ind. R. R. 21 Howard 442.

East Anglican Rys. vs. Eastern Counties Ry. 7 Eng. Law & Eq. 508.

Hood vs. N. Y. & N. H. R. R. 22 Conn. 16, 18, same case Ibid 508 &c.

Russell vs. Topping, 5 McLean 197 & 198.

Clark vs. Farrington, 11 Wis. 323, 324 & 333.

Beatty vs. Knowles, 4 Peters, 167 &c.

Second. The power asserted is not to be found in the statute and allows dealings in a business collateral to and dis-

tinct from banking. It gives the right to traffic with an alleged creditor in stocks, in order, by their resale, to acquire a fund to meet the claim which he holds. If the intent to apply the fund realized from the traffic to a proper purpose makes the transaction valid, on the same grounds a bank can trade in stocks to raise a fund to liquidate any indebtedness which it contracts. To buy stocks to resell, is a business as separate and distinct from banking, and no more given by the statute, than the power to buy grain, cotton or any other property with a view to make by its resale. The right granted in this case as incidental permits a bank to engage in any independent line of business and invest money, in order to raise the means it desires for a legal operation. Instead of using the plaintiffs funds in a banking transaction so as to replace the money to be paid on the claim, they were expended for stocks in order to raise funds by what was deemed an advantageous speculation.

The precise proposition involved in this controversy has been decided by the Court of Appeals of New York in a case of approved authority, directly contrary to the decision of the Maryland Court. An association was organized under the New York Banking Act of 1838 (from which the Act of Congress was taken), which in every way was far less stringent than the National Banking Law. The association became indebted to the State of Ohio for $200,000, and in order to settle that claim and avoid the loss apprehended from its enforcement entered into an arrangement by which it received from that state stocks of the par value of $230,000 for $238,000 payable on time. It was agreed that this stock should be again turned into money to pay off the $200,000 claim. This agreement was carried out and the fund realized applied in reduction of the claim. In this way the banking association averted or diminished the loss which it apprehended from an enforcement of the claim of the state, while the latter, like the defendant in error here, obtained a high price for its stocks. The debt of $238,000 contracted for the stock,

as well as the security given for it, was declared *ultra vires* and *void.*

Talmage vs. Pell, 3 Selden Repts. (7 N. Y. Ct. of App.) 342 to end of case, especially pp. 347 and 348.

The Court of Appeals of Maryland undoubtedly overruled this case, in the judgment which is the subject of the present controversy. But since this decision, however, there have been several adjudications in the different states on questions of a similar character under the National Banking Act, and almost without exception they sustain the view which we here present. The current of opinion has been so strong indeed as to induce the Court of Appeals of Maryland to change its views, and at the last term of that Court, in a case yet unreported, to reaffirm in the strongest terms, the case of Talmage vs. Pell above mentioned, and adopt it as the rule of its decision. This Court will find the decision of that unreported Maryland case to be almost the exact converse of the one we are now attacking, and we can therefore quote the latest decision of the Maryland forum in our favour.

Weckler vs. First National Bank of Hagerstown. April Term 1875, of Ct. of Appeals of Md.

Fowler vs. Scully, 72 Penn. St. Repts. pp. 461 & 462.

Shoemaker vs. National Mechanics Bank, 2 Abbott Circuit Ct. Repts. 422 & 423.

Shinkle vs. First National Bank of Ripley, 22 Ohio, 516.

Wiley vs. First National Bank of Brattleboro, 47 Vermont, 552.

First National Bank of Lyons vs. The Ocean Nat'l Bank, Ct. of Appeals N. Y., Albany Law Journal of April 17, 1875, explaining 54 N. Y. 671.

Thirdly. Such a power as we are now controverting is opposed to public policy and to the policy of the National Banking Act, and will not therefore be implied as incidental, even if it come within the words of the Act of Congress.

Foreman vs. Maryland Hospital, 29 Md. Repts. 530.

In that case it was expressly decided by the full bench, that a contract in the direct line of the company's business, but *contrary* to *public policy*, would be held *ultra vires*, unless the power to make the contract was *expressly* conferred. It would not be implied. Apply that doctrine here. On the face of the Act of Congress it shows two objects in view; one to secure the currency by a deposit of bonds; the other to secure the depositors of National Banks, and thereby to ensure the success of these institutions. To the accomplishment of the second the greater portion of the act is devoted. A third, equally clear, to be gathered from the whole act, was, for commercial purposes, to increase the banking facilities of the country, and to afford an easy and safe mode of transferring large sums between points at great distance from each other.

The importance of these several objects cannot be over estimated; and the two last require general confidence in the continued solvency of these institutions. The power required to uphold the present transaction is a power on the part of the bank to buy from every one of its creditors an amount of stocks sufficient to produce by their resale a profit over their real price equal to the sum which goes in liquidation of the claim. It is obvious there is no limit to such a power, as the quantity bought is to depend on the profit hoped for and the amount of the claim settled. The power which, it may be conceded, a bank has of acquiring stock or real estate in liquidation of debts previously contracted, is limited by the amount of the debt; and, as banks will generally deal with solvent customers, but little stock is likely to be thus acquired. But, if the power to purchase, in order to compromise a claim, is given, a favored customer could sell his whole array of stocks to the bank, and the Act which eased him would prevent it from answering the calls of its other depositors.

In fact, the larger the purchase, the more advantageous would be the compromise, because the greater the gain from the rise in value and resale, the more there would be to supply the sum lost by compromise.

On this occasion the evidence would indicate, that Wilkes

bought about $30,000 worth of stocks, in order by their resale to realize $10,000, which had been paid over and above their true value. In another case, where the claim is large and the profit less, the purchase might amount to hundreds of thousands.

No better mode of endangering the solvency of banking institutions could be devised than to give them a power so easily exercised of "receiving stocks to turn them again into money." No right of this kind is conferred in terms by the statute; every power enumerated can be executed without its aid; and section 46 assumes that it does not exist. Moreover, sections 31 and 32 force the banks throughout the country to keep a large portion of their funds in the larger cities, and then compel the institutions in those cities in their turn to deposit a large proportion of their funds in some bank in New York. The congressional debates on the statute recognize the financial dependence of the country on New York city, and these provisions ensure its continuance. In all large cities, especially in that great financial centre, the leading danger to monied persons and institutions comes from the buying and selling of stocks. Grant the right, here contended for, of settling a claim by buying stocks from the creditor, and every depositor or other creditor could unload himself of his stocks to the bank without limit. The favored ones would do so in all cases when to their advantage. A power so easily abused for the purposes of speculation, which exposes the bank officers to the importunity of holders of stocks, would jeopardize every institution in the larger cities, and in the end ensure the ruin of many. Stockholders and depositors could never feel safe. The right to divert the funds of the bank "by receiving to be again turned into money," real estate, dry goods, grain or any other article possessing an intrinsic value, would be far less mischievous; and it is incredible that a power of such dangerous scope and tendency can be implied as incidental to those which are enumerated, when not a single syllable is to be found among the hundreds of provisions of the Act that lends countenance

to the supposition. A general act of this kind which provides for a large number of institutions, must necessarily grant and withhold powers *by classes*. The statute cannot in one case permit the act because it is advantageous, in another forbid it as operating injuriously. Congress granted such powers only as would in the long run conduce to the success of the institutions and at the same time compel them to answer the demands of the community. Those were withheld which were likely to prove hurtful, or to divert them from the great ends of their creation. Under the decision in Foreman's case the power will not be implied.

It is moreover universally conceded, that the specifications of powers in acts of incorporation are the pledges which the legislature gives to stockholders, to induce them to embark their funds in those enterprizes. Yet this licentious theory, under the guise of incidental rights, enables a cashier, by one transaction, perfectly valid in law, to ruin his bank, impair financial confidence throughout the country, and defeat the minute precautions of the statute, without giving the least suggestion of such a power to the stockholders. The promise given by the Act would be kept to the eye and ear, while to the hope it would be most ruthlessly broken.

Again, it is an undoubted legal inference from an enumertion of powers, that there was a motive in confining the corporation to those which are specified. The carefully remodelled grant of powers in the 8th section shows, that Congress considered it injurious for National Banks to expend their funds in other modes, and it is completely certain, that the intention of the enactment is to preserve as much capital as possible to answer the banking calls of the country. In this way they are of great public benefit. But no one can doubt, that, if the power exists to receive stocks for money under the conditions set out in the learned Judge's opinion, a large portion of the capital of every bank would be continually locked up in this most alluring and uncertain kind of prop-

erty, which would have to be turned again into money, often at great loss, before it could answer the calls of the depositors. Why keep banks out of real estate, cotton and grain speculations, if they are allowed to traffic in articles of a far more dangerous nature, which often have no intrinsic value, and are liable to fluctuate violently with every wind which affects financial credit? And yet, nothwithstanding numerous amendments, the Act has remained in this respect unaltered since 1864.

Fourthly. The true doctrine is that the terms of a compromise must, equally with every other contract, be the exercise of some one of the express powers, or of those which are *naturally* incidental or necessary thereto.

A right to settle, by way of compromise, a debt held by the defendant, is manifestly inconsistent with the idea of the transfer to the plaintiff by the defendant of any other thing than the debt so held. Compromise can mean nothing more than mutual concession, each side receding from the position it first assumed, the one agreeing to take less—the other to give more than the amount respectively claimed to be due. Therefore, they meet at some middle ground; and the defendant transfers its claim to the debt to the plaintiff, and the plaintiff passes over to the defendant property in its stead. Plainly, it is nothing more than *payment*, and the only thing which the defendant gives is its title to the chose in action; every thing else comes from the plaintiff. How can the power to make such a settlement invest the Bank with power, not only to pay off its debt—not only to transfer money for its discharge—but to take from the defendant some other distinct property, and, besides the funds which really went in liquidation of the claim, to lay out more of its money in obtaining a species of property which the policy of the law forbids it to hold? The compromise must be a discharge of the claim by transferring something different from its face amount; and cannot give life to a transaction having no *ne-*

cessary connection with the idea of *payment*, and which is otherwise invalid. In other words, as the books say, the power to compromise, which is a means to accomplish an end, cannot be erected into an *end itself*, and all powers which may tend to its accomplishment be necessarily implied. The mode of accomplishing the compromise must be natural; it must be in the nature of a *payment*, not of a purchase of something else.

East Anglican Railway, vs. Eastern Co: Railway 7 Eng: L. & Eq. 508 & 509.

Russell vs. Topping, 5 McLean (Circ. Crt.) Rept. 198 & 199.

Clark vs. Farrington, 11 Wisconsin Reps. p. 324.

In the last case, the distinction is clearly drawn that the power which is implied must be one leading *directly* and *naturally* to the one granted; it must not be one which the parties *make the means of bringing about the end*, but one which *in itself naturally tends to it*. As the Court there says, instead of money the corporation can take a mortgage or other security, and raise the money by assigning the security; but it could not, in order to raise the money, enter into a purchase of land in the hope of its rising in value, and thus embark the funds of the corporation in a distinct and different enterprise; although the object of the investment was to raise money to be applied in furtherance of the same ends, and this was at the time the most advantageous method for that purpose.

The power to compromise is itself but an implied power, resulting from the right to sue and be sued; and the law does not permit, first, to imply a power; and then, upon the one thus implied, to found another; and so on, without limit, implying for each preceeding power whatever is advantageous to its exercise; until thus, through the agency of implication, is accomplished what is utterly opposed to the policy of the Statute, and entirely foreign to the powers expressly granted.

III. Conceding the contract to have been invalid, the only other question is, is the plaintiff in error, having paid

the money for the stocks and the contract being wholly executed, in a position to recover? That question was a *concessum* in the Court of Appeals of Maryland, and has been settled beyond controversy in that state by decisions in other cases; and this Court is concluded by that decision, upon the principles announced in Murdoch vs. the city of Memphis, 20 Wallace Reps. 365.

While a National Bank has no authority to purchase stocks, yet the right so to purchase is not in terms *prohibited* to it; there is no *penalty* imposed for its exercise; its exercise is not *malum in se* nor *contra bonos mores;* the Act is simply *void,* because *ultra vires.* Under such circumstances, the defence of "executed contract" or "*in pari delicto, &c.*" does not apply, and the party paying money under the void act, can recover.

Foreman vs. Maryland Hospital, 29 Md. Reps. 531.
Horn vs. Mayor and City Council. 30 Md. Reps. 222, 223.
Tracy vs. Talmage, 14 New York (4 Kernan) 162.
Curtis et. al. vs. Leavitt, 15 New York (1 Smith) 1.

The case of Foreman vs. Maryland Hospital was twice argued and most elaborately considered, and settles the doctrine in Maryland.

There the plaintiff who had full power to make the contract, who had solicited its execution, who had received and enjoyed the full consideration, was enabled to recover without any offer to return, because the corporation would not have been estopped. Here, a principal simply seeks to recover what was paid by an unauthorized agent to a party who had knowledge of his instructions. The doctrine of estoppel, applied to corporate acts in excess of their powers, would enable them, by simply executing their contracts, to exceed chartered limits with impunity. Public policy requires its limitation, for otherwise every party who transferred the consideration and received the money could bid defiance to the plainest provisions of the law. Besides, it is a most familiar principle

of agency that a party who deals with knowledge of an agent's powers cannot bind the principal beyond the scope of his instructions. Now, the defendant's officers had full knowledge of Wilkes' powers. The very act which each had sworn to observe, gave them notice he was instructed not to make this contract; that he was paying them the funds of the plaintiff's stockholders for a purpose which his principal did not and could not authorize. They, in fact, co-operated with him in injuring the plaintiff, and it would be absurd if, after they had induced him to work this wrong on his principal, the law would permit them to repel the principal's demand, made through its authorized attorneys, on the ground that their plans had been fully carried out. Policy, principle, reason and precedent, concur in beating down the defence of contract executed.

IV. The decision of the Maryland Court of Appeals upon the right of the plaintiff in error to recover notwithstanding the execution of the contract, being upon the principle of Murdoch vs. City of Memphis, conclusive upon this Court, the only question left for adjudication is the federal one, viz: the right of a National Bank to purchase stocks under the circumstances of this particular case. If this Court shall determine that question in favor of the plaintiff in error, the latter is entitled to a *final judgment* in this tribunal, or to a reversal, as the Court may see proper to decide.

It is earnestly insisted, in behalf of the plaintiff in error, that the Court will end this controversy here.

The parties waived a jury, and the record contains the special finding of the Court below on the facts, which is conclusive, as well as the proposition of law which governed its decision. The bill of exceptions and the pleadings present all that is necessary to a full comprehension of the lower Court's finding; and looking at it in the light of the surrounding circumstances, this Court can have no doubt of the real state of the case. The Judiciary Act of 1867 (14 Stats. at large, 385) expressly confers the power to enter up final

judgment in such cases, (see Murdoch vs. City of Memphis), and it is difficult to conceive of one in which such a course would be more eminently proper.

V. It appears, from the opinion of the Court of Appeals of Maryland, that it did not find it necessary to rule on the contention urged by the counsel for the defendant in error, that the opinion of the Superior Court of Baltimore City was not a subject of appeal. It proceeded on the concession that an appeal would lie from that opinion ; and the correctness of that concession would seem to the counsel for the plaintiff in error to require no argument.

It is settled law in Maryland that, when a cause is submitted to a Judge without the intervention of a jury, the Court of Appeals will *review any proposition of law which it can make out from the judge's opinion to have been decided* below, and although it will not look to the evidence to determine the correctness of the ruling on the facts, it will yet do so in order to a full understanding of the questions decided. When several prayers are granted on one side in an ordinary jury case, embracing different hypotheses of facts, an appeal is allowed, because under one of them the verdict may have been rendered. So also, if, in addition to the prayers or in their stead, the Judge should express to the jury any of his views, either in writing or orally, if they are afterwards reduced to writing. The record in such case shows propositions of law to have been decided. If one should happen to be incorrect, the higher Court cannot say that one did not produce the verdict, and the judgment is reversed to prevent the possibility of a party losing his cause by a ruling contrary to law. In this case, the learned Judge of the Superior Court, after stating that he finds certain things to have occurred as facts, decides as a naked legal question, that a bank can, under such circumstances, "*receive stocks to be again turned into money,*" *&c.* Had the opinion stopped there, the record would show a proposition decided which probably influenced the verdict of the lower tribunal. But to leave no

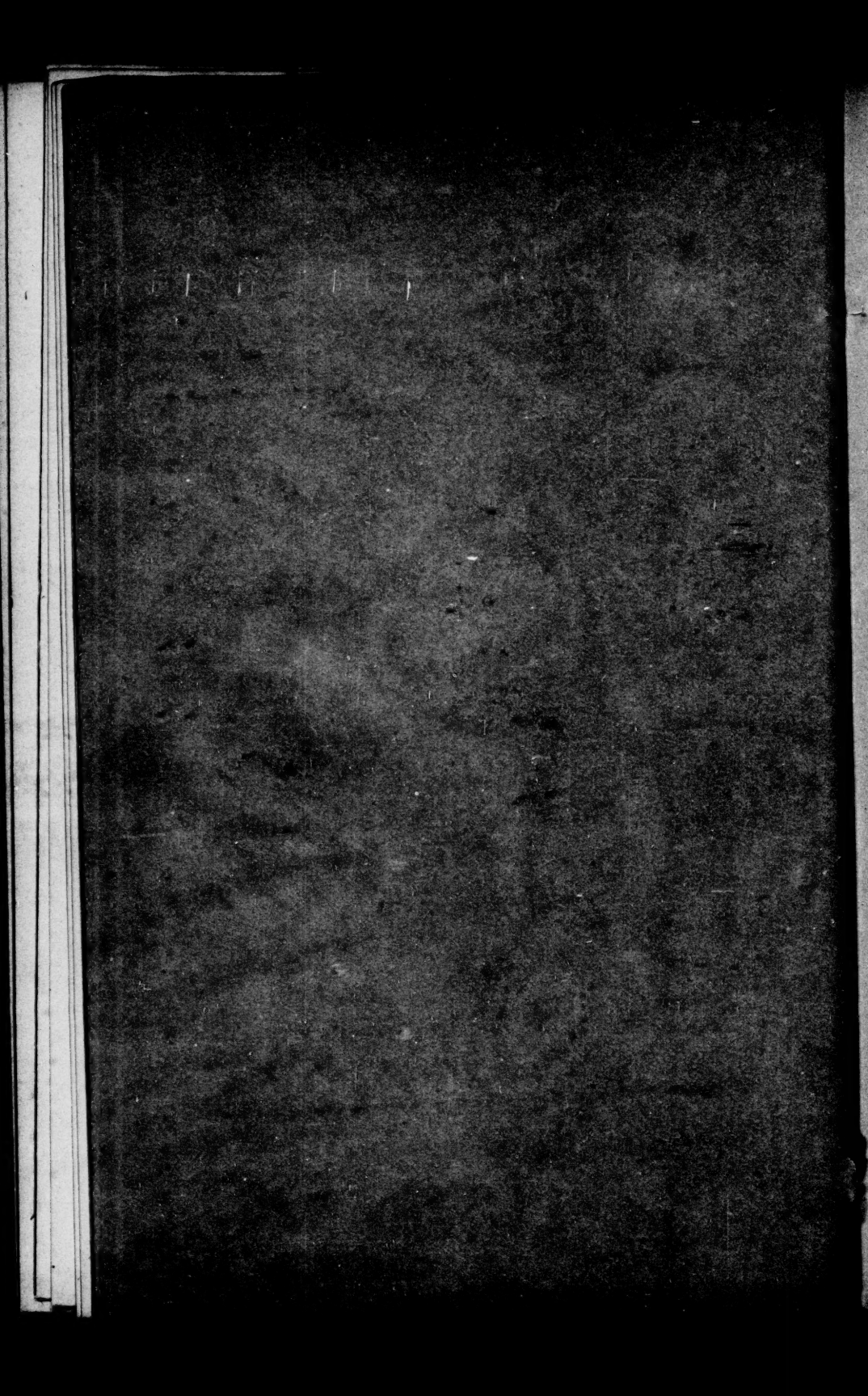
room for doubt, the Judge goes on to say, that he believes the evidence to establish precisely this state of facts, and, on account of his conclusion on the law, he renders a verdict for the defendant. If the law be incorrect, the record shows the plaintiff lost his cause by the Court's error, i. e., by an unjust decision. The authorities could not but establish the right of appeal.

Thomas vs. Hunter, 29 Md., 411.
Tinges vs. Moale, 25 Md., 484 and 485.
Insurance Co. vs. Sea, 21 Wallace, on p. 161.
Norris vs. Jackson, 9 Ibid. on p. 128.

Respectfully submitted,

J. UPSHUR DENNIS,
JOHN SCOTT, JR.,

For Plaintiff in Error.



Supreme Court of the United States,

October Term, 1875,

No 193.

THE FIRST NATIONAL BANK OF CHARLOTTE,

Plaintiff in Error,

vs.

The National Exchange Bank of Baltimore,

Defendant in Error.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

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The position assumed by the defendant in error, in its brief, makes some further discussion in behalf of the plaintiff in error necessary.

I. The general propositions of law as contended for by the plaintiff in error, seem to be conceded, and the defence to a reversal of the judgment of the Court of Appeals of Maryland, is grounded almost wholly upon what is assumed to be the true interpretation of the opinion of the Judge of the Superior Court of Baltimore city, viz: That *all* the money paid in this case was *paid for the certificate of deposit, and nothing was paid for the stocks;* and that, while payment for the stocks would have been illegal, it was within the power of the Charlotte Bank to compromise the claim against it on the certificate of deposit, by paying thereon less than its face value.

This assumption of the meaning of that opinion, is made for the first time in this Court; it was never heard of before in either tribunal in which this case has been tried, and is entirely unfounded. It is not only unsupported by the facts, but so contrary to what was proven by the testimony upon both sides, as to make it impossible for the Judge of the Superior Court to have adopted it; and the Court of Appeals of Maryland, in their opinion, placed an entirely opposite construction upon it.

The plaintiff in error desires entirely to disclaim any idea of reviewing the facts for the purpose of showing the Court's finding thereon was wrong; whether right or wrong, that finding is conclusive, and is so accepted. But it is abundantly established by the authorities cited in its first brief, that when the Court, sitting as a jury, enunciates a proposition of law governing a case, it is proper to examine the evidence in order to a full and correct understanding of that proposition. The opinion of the Court in such a case stands, and will be treated, as an instruction; and as the latter can only be read in the light of the evidence bearing upon it, so in the case of the former, recourse must be had to the same source for its intelligible construction. But the concession in the brief of the defendant in error, (p. 10,) is enough upon this point. "It is necessary to connect the opinion with the evidence in the case, to give point and meaning to the general language used by the Court in its finding upon the facts, and to render that finding sufficiently intelligible and precise."

We shall in this connection discuss the opinion of the Judge of the Superior Court, because the hypothesis of facts there found is the one with which we have to deal, and because the Court of Appeals reaffirm in almost *ipsissimis verbis* the proposition of law therein contained.

The material facts, in the light of which we have to construe that opinion, are these: The plaintiff in error's witness, Wilkes, testified, that he offered the defendant in error $5,000 for the certificate, and that at no time did they ask over $20,000 for it, which sum, however, he refused to pay; that finding the defendant in error anxious to dispose of some of the collaterals it held from Bayne & Co., he subsequently entered into an arrangement with it, by which he purchased 400 shares of the W. G. & Alexandria R. R. stock, at $80.00 per share, (its

par value being $100 per share,) and 1000 shares Coal Company stock at $8.00 per share, (par value being $10.00;) that in that transaction, it was expressly understood and agreed that all the money thus paid was paid WHOLLY FOR THE STOCKS, he refusing to recognize any liability of his bank on the certificate; but it was also agreed, that in consideration of the purchase as aforesaid, the certificate should be delivered up to him; that before said purchase, he had satisfied himself by careful and diligent inquiry in Washington and elsewhere, that the stocks, though thus purchased at perhaps 25 per cent. more than their *then market* value, would, in his expectation and belief at the time, largely increase in value.—(pp. 9 and 10.)

Wilkes was the only witness for plaintiff in error.

There were but three witnesses for the defendant in error. The first of these, Spiller, testified that the defendant in error agreed to sell to the plaintiff in error the said certificate, some W. G. & Alexandria R. R. stock, and some Coal Company stock, at prices agreed upon at that meeting, and to take in payment certificates of indebtedness of the plaintiff for $40,000; that there might have been some pencil memoranda of the amount of stocks the plaintiff was to get, and of the *prices* it had to pay, (bottom of p. 12, and top of p. 13.) Their next witness, Smith, testified that Wilkes disavowed all liability on the certificate, but in order to obtain it, offered to buy the said 400 shares of R. R. stock at $80.00 per share, and 1000 shares of Coal Company stock at $8.00 per share; that the defendant in error's agent being informed by Wilkes, that under his instruction he could not treat upon the basis of any liability of the plaintiff upon said certificate, the above offer was gladly accepted, and it was *agreed that the certificate should not form a part of the consideration for which the* $40,000 *was paid;* but that he himself regarded the surrender of the certificate as the basis and essence of the transaction, and except for the controversy in relation thereto, the said agreements would never have been made, nor the certificate delivered up with the stocks, unless the $40,000 had been paid.—(bottom of p. 13 and top of p. 14.)

The only other witness for the defendant in error, Riddle, testified, that before the failure of Bayne & Co., the R. R. stock aforesaid was worth almost its par value; that the defendant in error had then loaned on it to Bayne & Co., at the rate of

$80.00 per share; that it depreciated greatly after the failure of said firm; that in September, 1866, (*the time the agreement was entered into*—see Wilkes' testimony, top p. 9,) it was *worth over* $50.00 per share, but had no market value, for the parties who held it could not afford to throw it upon the market at that price; and that in September, 1866, the coal stock above mentioned was selling at the Baltimore Stock Board for from $4.00 to $7.00 per share.—(bottom of p. 14.)

These were the only witnesses in the case, and the above summary contains the whole testimony upon the terms and nature of the agreement, and the value of the stock. It will be seen that there was no discrepancy in the testimony as to what the agreement was—all the witnesses to the transaction agreed that the contract was that, upon the payment of the $40,000 agreed upon for the stocks, the defendant in error would deliver said stocks, and also give up the certificate of deposit.

The two main parties to the transaction, Wilkes and Smith, further testified, that by *express agreement* between them, *no part of the money paid should go for the certificate*, as Wilkes was instructed to recognize no liability on account of it.

Of course the Judge of the Superior Court knew, as matter of law, that the parties could make that contract, and fix those prices upon the stocks, if they so chose; that it was only required that the stocks should be worth something valuable, in order to constitute a sufficient consideration to support a contract, and the parties could agree upon what prices they pleased for them; and that the Courts must deal with the contract as the parties have made it, and not make a new one for them.

It will be further noted, in determining whether the $40,000 was really paid to recover the certificate, that that certificate, except for the purpose of being held *in terrorem* over the plaintiff in error, was not worth the paper upon which it was written; it was not negotiable, (it being for bonds, not money,) its assignment to the defendant in error by Bayne & Co., was consequently subject to all the equities, and there having been at the time it has given an express agreement that it should not be passed off, and it also having long before been paid off to Bayne & Co. by the plaintiff in error, the latter was of course no longer under any liability upon it.

Without analysing the words of the opinion for its meaning, with what reason can it be contended, in the light of the above facts, that the Judge of the Superior Court has determined that all the money which passed in the transaction was paid for the certificate of deposit and none for the stocks; that he has found a fact not only not countenanced by a single expression of any one witness, but entirely at variance with the testimony of every one who was called to the stand?

It is evident, too, that the Court of Appeals of Maryland never regarded the opinion of the Judge of the Superior Court as capable of the construction now sought to be fastened upon it. In their opinion (top p. 23,) they carefully set out the agreement actually entered into, viz: That the plaintiff in error should take the stocks mentioned, for the sum of $40,000; and then they add, "*upon the basis of this settlement, the defendant was to deliver up to Wilkes the certificate held by it for the* $55,000 *U. S. bonds.*"

But the words of the opinion itself put its meaning beyond doubt. The Judge, after admitting the proposition of law that a National Bank cannot purchase stocks either for investment or speculation, says: "Instead of the purchase of stocks, in the ORDINARY sense of that term, the Court finds the transaction between the parties to have been a fair and bona fide *compromise* of a case in which the plaintiff, finding itself subject to a claim for $55,000, founded upon a transaction admitted in argument to have been a legitimate banking transaction, thought it expedient to reduce an apprehended loss by a COMPROMISE, in which it acquired the stocks in question. That a National Bank has a right under such circumstances to save itself from loss through the medium of an *arrangement* by which it shall receive stock, to be AGAIN TURNED INTO MONEY, to avert or diminish an apprehended loss, and not for investment or speculation, the Court does not doubt; and believing from the evidence this to have been such a transaction, it now enters a verdict for the defendant."

The meaning of this opinion would seem, in the light of the facts proved in the case, to be free from any doubt. But it is contended, that inasmuch as the Court granted the plaintiff's prayers, and as those prayers contained the proposition that the plaintiff was entitled to recover the money paid upon the

stocks, and yet the Court found a verdict for the defendant, that therefore the Court found as a fact, that *no money* was paid for the stocks.

A careful examination of the opinion in connection with these prayers will negative such a conclusion as decisively as does a review of the facts. It will be seen at once that each of those prayers contained a fatal vice, in view of the facts actually found by the Court, in that each treated the transaction as a *purchase* in the "ORDINARY sense of that term;" while the Court found that it was *blended with the settlement of a disputed claim*, and that the transfer of the stocks so took its color from that compromise as to have lost the character of a naked purchase. Believing, as it says, that a naked purchase of stocks, either for investment or speculation, was void, but that the transaction in question was not a purchase in the ordinary sense, but an acquisition of stocks through the medium of a compromise, and the plaintiff's prayers all containing the fatal hypothesis of the former fact, it necessarily both granted the plaintiff's prayers and yet found the verdict against it.

The Court of Appeals of Maryland have incorporated the opinion of the Superior Court in their own, and they concur in the proposition of law there announced, which they construe to mean that "if instead of *purchasing* the *stocks* in question for *investment* or *speculation*, the plaintiff acquired them by way of a compromise of a claim of $55,000, alleged to be due the defendant, and for the purpose of averting an apprehended loss on account of said claim, there is nothing either in the letter or spirit of the banking act to prevent, under such circumstances, a transfer of the stocks to the plaintiff."—(page 24.) Having, just before in their opinion, set out as an undisputed fact that the defendant in error never at any time asked but $20,000 for the disputed certificate, and the plaintiff only offered for it $5,000, and that by the terms of the agreement the whole $40,000 was paid for the stocks, (bottom of page 22, and top of 23,) it surely was never in their minds that the opinion meant that the whole $40,000 was paid for the certificate, and nothing for the stocks.

II. It has been further insinuated rather than openly and directly asserted, that the case is one in which the plaintiff in error became substituted to the rights of the defendant, upon a discharge of its own claim on the certificate of deposit of U. S. bonds.

The power of a National Bank may be open to argument in a genuine case of substitution, involving the relation of principal and surety, where, upon the payment of the debt, the surety becomes entitled to its amount against the principal, by virtue of the contract entered into between them at the inception of the claim itself.

Here it is only necessary to say, that there was no evidence tending in that direction; that the point was never made; and that the finding of the judge completely lays any such theory out of the case. His verdict on the facts is to be taken as conclusive, and none know better than our adversary that substitution had nothing, whatever, to do with the decision of this cause.

In conclusion, we cannot forbear uttering our remonstrance against the attempt to turn the High Court of our great country into a tribunal to review questions entirely foreign to the controversy before it. If the judge below had expressed himself with such awkwardness and want of care as to completely hide his real finding, an ingenious advocate might be pardoned for attempting to make out that his decision was not what he intended it to be. But here there was no doubt in the light of the evidence as to his real finding, and as to the evidence which he credited. It is completely certain, that unless he had entertained the opinion of the law which we assert that he has enunciated, the judgment of the Court would have been in our favor.

He set out his views with sufficient distinctness, in order that they might be reviewed, and to prevent the plaintiff from suffering an injury by an erroneous construction of the National Banking Act.

The case was accordingly presented to the Court of Appeals of Maryland, when it was not for one moment denied that the proposition to be decided was as we understood it to be.

The right to appeal at all, was indeed earnestly denied, and that question the Court refused to consider, conceding it for the sake of argument, but the proposition of law contained

in Judge Dobbin's opinion, the Court of Appeals have announced in the language of the appellant's contention, and any want of explicitness in their opinion on that point, is due to the fact that its meaning had not even been controverted.

Now the case is attempted to be wrested from its true meaning, and a view of the matter taken which is a pure fiction of the imagination. The facts are said to have been found against all the evidence in the cause, and the counsel for the defendant desires to startle the Judge who made the finding in the cause, by procuring this Court to say that he made a decision which he would be the first to deem a foul blot on his good name. If he proves successful, we must bow to the result, but we persuade ourselves that his endeavors will be fruitless, and that it will not happen that we are to be the victims of what can be nothing but a farce and a mockery of justice.

Respectfully submitted,

JOHN SCOTT, JR.,
J. UPSHUR DENNIS,
For Plaintiff in Error.

Supreme Court of the United States,

October Term, 1875,

No. 193.

THE FIRST NATIONAL BANK OF CHARLOTTE,

Plaintiff in Error,

vs.

The National Exchange Bank of Baltimore,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WM. F. FRICK, for Defendant in Error.

Supreme Court of the United States,

October Term, 1875,

No. 193.

THE FIRST NATIONAL BANK OF CHARLOTTE,

Plaintiff in Error,

vs.

The National Exchange Bank of Baltimore,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiff in error, a National Bank in Charlotte, North Carolina, in December, 1865, desiring to increase its capital stock, and for that purpose, to deposit with the proper department at Washington, $55,000 in U. S. Bonds, employed Bayne & Co., of Baltimore, as its agent to procure and deliver them at Washington. Not having money to pay for them at the time, the bank sent its president, Wilkes, to Baltimore, with a certificate previously prepared in Charlotte, as follows: (Page 7.)

First National Bank of Charlotte, North Carolina.

CHARLOTTE, December 15th, 1865.

Received on deposit from Bayne & Co., fifty-five thousand U. S. 5-20 bds., 3d issue, payable to the order of themselves, on the return of this certificate.

JOHN WILKES,

President 1st Nat. Bk. of Charlotte, N. C.

This was handed by Wilkes, president, to Bayne & Co., in Baltimore, and Bayne & Co., on the 18th December, 1865, having endorsed the certificate, deposited it, together with other securities, with the defendant in error, a National Bank in Baltimore, as collateral for a call loan of $80,000, then made by that bank to the said firm, (Riddle, page 14.) Out of the proceeds of the loan so obtained, Bayne & Co. purchased for the plaintiff $50,000 of U. S. Bonds, and on the 20th December, 1865, delivered them to Wilkes, the plaintiff's agent, in Washington, who deposited them with the proper department, and obtained the desired increase of capital, these being the bonds to secure the return of which the aforegoing certificate was issued and delivered. (Wilkes, page 7.)

The Charlotte Bank had a running account with Bayne & Co., which is filed, (page 7.) It is conceded that none of the items in said account prior to December 19th, had any reference to said bonds, but only to the general dealings between the bank and Bayne & Co., who were its general agents. (Page 8.)

The bonds were paid for by deposits to the credit of Bayne & Co., in New York, after the 19th of December. In January and February, 1866, the plaintiff in error, received verbal notice from Bayne & Co., that the certificate was satisfied, and was subject to its order. In March, 1866, it received a written notice to the same effect, but it did not apply for its surrender. In April following, Bayne & Co. failed; and the plaintiff in error was then notified by the defendant in error, that it held said certificate of deposit for value, and that it demanded the delivery of the bonds therein mentioned. (Page 8.)

Wilkes, the president, was sent by his bank to Baltimore, to negotiate for the return of the certificate. He informed the defendant that it had been satisfied, and disavowed any legal liability for it. Offers of compromise were made on both sides, but no agreement could be reached, and the defendant in error, thereupon threatened suit. Wilkes asked for delay, and requested that no action should be taken until he could return to Charlotte and consult his directors. He returned again to Baltimore, and a new negotiation for compromise of the controversy existing between the two banks in regard to their respective legal rights to the certificate was opened. Wilkes accidentally discovered (Spiller, page 13,) that the defendant in

error, held among its collaterals from Bayne & Co., a very large number of shares of Washington, Alexandria & Georgetown R. R. stock.

The market value of this stock had been seriously depressed by Bayne & Co.'s failure. In fact, it had at the time, *no market value at all.* (Spiller, page 13; Smith, page 14.)

Besides, a controversy was pending in Washington, between parties both claiming to be entitled to the franchises of the corporation, and the stock could not be transferred. Wilkes, however, went to Washington and elsewhere, to post himself privately about the real condition of the stock, inquired thoroughly into all the facts connected with the litigation and the prospects of the road, and came to the conclusion in his own judgment, that the future value of the stock would be *at* or *above* par, (Wilkes, page 9.) Thus posted, he returned to Baltimore, and after one or two negotiations between him and the president and directors of the defendant in error, it was finally agreed that the plaintiff in error should pay to the defendant in error, in certain instalments, the sum of $40,000, and receive back its certificate of deposit for $55,000 of U. S. Bonds, and should receive in addition 400 shares of the Washington, Alexandria and Georgetown R. R. stock, and 1,000 shares Maryland Anthracite stock, all of which were part of the securities held by the defendant as collaterals for its loan to Bayne & Co., with which they had bought the $50,000 U. S. Bonds for the plaintiff in error. Mr. Wilkes is not able to recollect whether the proposition, which led to this agreement, came originally from him or from the defendant in error. (Wilkes, page 9.)

It is fully conceded that in making this arrangement, Wilkes acted entirely on his own judgment of what was best for the interest of his bank, and upon no representations or urgency of the defendant in error, except their threat of suit. It was of the utmost importance, that his bank should get back its certificate of deposit. He told Spiller (page 12,) that he had called a meeting of his directors and stockholders on his return from Baltimore, after his first ineffectual attempt at compromise, "and they had agreed with him that *it would be fatal to them to have a suit brought on the certificate* in view of the purposes and plans of the bank at that time." He had satisfied himself also, that the losses of his bank, in redeeming said certificate, might be considerably lessened by its getting railroad and coal stock

"His belief and expectation at the time of said agreement was that it would increase greatly in value." And he concedes, in the frankest manner, that he made the compromise "on his own judgment, and that of the parties of whom he inquired, and not on the faith of any representations as to the value of the stocks made by the defendant's agents, and that he makes no charge of bad faith or misrepresentations against them." (P. 9.)

Although the sole object of Wilkes in this negotiation was to get back his Bank's outstanding certificate of deposit, it was also desirable, so far as his bank was concerned, that it should not *appear* upon its books, that it had paid twice for its $50,000 U. S. Bonds deposited in Washington.

The discovery of that fact by the Comptroller of the Treasury, might obviously have been, to use his own language, "fatal to the plans and purposes of his Bank."

It is therefore specially to be remarked, that while the defendant in error evidently did not attach much, if any value, at all, to the railroad and coal stocks, and was willing to throw part of them in, in order to get a compromise of the $55,000 certificate of deposit at $40,000, it was plain that Wilkes, for the protection of *his* bank, desired to fix a large *nominal* value on those securities, and little or nothing on the certificate of deposit. Spiller, one of the defendant's directors, (p. 13,) says, "he stated to Wilkes that some of the securities *were very doubtful;* that the railroad stock was then in suit. Wilkes "replied that he could carry them as a *suspended debt account*, which struck witness as something new in National banking." Spiller further says, the railroad stock at the time had *no* market value, and the coal stock had little or none," (p. 13) Smith, another of the defendant's directors, says the same thing, (p. 14.) Wilkes, nevertheless, for his own purposes, chose to ignore any value in the certificate; and as a representative of the $40,000 to be paid by his bank, put a valuation on the railroad stock of $32,000, and the coal stock of $8 000, that it might appear in that way upon the books of *his* bank. But no papers were signed or writings made out to this effect. The whole arrangement was entirely verbal. That these figures were *nominal* merely, and did not represent the real transaction, and that they were named by one of the contracting parties, Wilkes, for his own purpose solely, and in fact, for the purpose of *misrepresenting* the real transac-

tion for ulterior purposes of his own bank, with which the defendant in error had nothing to do, cannot be seriously disputed.

Mr. Smith, one of the directors of the defendant in error, who made the negotiation, says, "*he himself (Smith,) regarded the surrender of the certificate as the basis and essence of the transaction;* and except for the controversy in relation thereto, *the said agreements would never have been made,* nor would the certificate have been delivered up with the other stocks, unless the $40,000 had been paid or secured."—(p. 14.)

Wilkes virtually admits the same thing. He says (p. 9,) "he would not have paid the money *if the defendant had not given up the* $55,000 *certificate.* He purchased the stocks *to save the litigation about said certificate. The whole matter deserved the name of a compromise,* each party being unwilling to go into Court. Each party had to suffer by Bayne & Co., and *each agreed to bear a part of the loss.* This was *his* view of the transaction."

The arrangement for the surrender of the $55,000 certificate being thus agreed upon between Wilkes and the defendant, he submitted it to his directors, who approved it. His bank paid the defendant on account, $5,000, and issued its certificates of indebtedness for $35,000, running from 1st January, 1867, to October 1st, 1868, (p. 10.) The certificate of deposit of $55,000 U. S. Bonds was thereupon delivered to Wilkes by the defendant, and Wilkes wrote across its face at the time, "cancelled, having been satisfied prior to Dec. 25, 1865. J. W."—(p. 7.)

The certificate for 1000 shares coal stock was delivered and transferred to the plaintiff, and it subsequently received dividends thereon to the amount of $400. The railroad stock was not formally transferred, there being a suit about it at the time of the agreement, which prevented all transfers, (p. 10,) but it was conceded, (p. 15,) that subsequent to the agreement of 1866, the 400 shares of railroad stock were regarded and treated by both parties as belonging to the plaintiff in error; that both parties had agreed to prosecute in common with others who held like stock, a suit by which it was affected, and that a common fund had been raised for that purpose, to which the plaintiff in error had contributed its proportion as owner of 400 shares.

This compromise, made, as is conceded, in perfect good faith on both sides, as a settlement, having reference exclusively

to the disputed title of the defendant in error, to the $55,000 certificate, was thus *fully executed* by return and cancellation in 1866, of the certificate itself, and delivery of the stocks, and by the delivery on the other side, of certificates of indebtedness to the sum agreed upon, which, by October 1st, 1868, had all been paid without objection.

Nearly three years afterwards, Aug. 7, 1869, the defendant in error received from Mr. J. Dean Smith, professing to be the attorney of the Charlotte Bank, the letters on pages 10 and 11. In 1866, at the time of the compromise above stated, Mr. Smith was not only the standing counsel of the defendant in error, but he had been specially employed, on its behalf, to go to Charlotte to press the claim of the defendant in error, against the plaintiff in error, upon its $55,000 certificate.

He was the counsel of the defendant in error during all its negotiations for the settlement of that controversy and "approved of the settlement, and said it was a most admirable arrangement."—(see Spiller, p. 13.)

It will be found, that Mr. Smith, in the letter referred to, prefers a claim *against* the bank for which he had been formerly acting as counsel, on *behalf* of the bank against which he had then been so acting, for the return of the $40,000 paid by the latter under *his* advice, upon the ground that it had been obtained by *false representations* of the officers of the defendant, as to its title to the railroad and coal stock, transferred to the plaintiff, and that the certificate in controversy had been obtained by fraud.

The letter of the attorney of the defendant in error, (page 11,) naturally expresses surprise at this entirely unfounded charge, and especially in view of the quarter from which it proceeds, and declines, on its behalf, to return the fund "upon any of the grounds set forth in the letter."

The suit was instituted by J. D. Smith, attorney, on the 10th Sept., 1869, and on the 27th Jan'y, 1873, when the case was called for trial, the plaintiff's attorneys "tendered in Court to the defendant the certificate for 1000 shares of coal stock, with the dividends received on it, together with the certificate

of deposit of $55,000 *marked, "cancelled," &c., on its face with a verbal offer to agree not to plead limitations on it, in case of suit.*

The case by agreement was tried before the Court, (J. Dobbin,) without a jury, and the plaintiff asked the granting of four propositions of law to govern the Court in deciding upon the facts.—(see p. 15.)

This was in accordance with the Maryland practice, (wherever the Court assumes also the functions of the jury) in order to show distinctly to the appellate Court, what questions *of law* were raised and decided below.

The *first* proposition is to the effect that if the plaintiff *agreed to purchase* for $40,000 the R. R. and coal stock, and paid that sum, then the Court must find for the plaintiff for that amount, provided the Court shall further find, that the defendant knew the plaintiff to be a National Bank; although the Court shall further find, that the certificate of deposit was delivered up in consequence of said contract, *if by said contract no part of the* $40,000 *was to be paid for the certificate.*

The *second* is to the effect, that if the plaintiff *agreed to purchase* the said stock for $40,000, and Wilkes also agreed to purchase for $15,000, 125 shares of plaintiff's stock, and the inducement to both agreements was Wilkes' desire to obtain the certificate, and he did so obtain it, that does not enure to make the first contract valid, provided it was agreed *that no part of said* $40,000 *should be paid for the certificate of deposit.*

The *third* is to the effect, that if the plaintiff, in order to compromise the certificate of deposit, *agreed to purchase* it and the R. R. and coal stock for $40,000, and paid the money, then the plaintiff is entitled to recover so much of said sum *"as the Court shall find was paid for said stock."*

The *fourth* is to the effect, that if there was an *agreement for purchase* as stated in the third prayer, and it was executed, the effect of the letter of defendant's counsel of August 16th, 1869, *was to waive all tender of what was received by the plaintiff under said purchase,* and the plaintiff is entitled to recover back the $40,000, if the Court shall find that the defendant was not prejudiced by the plaintiff's delay to rescind the contract, and that the same was done in a reasonable time.

The Court heard arguments on the law and also on the facts. It granted the propositions of law as asked for, but

found a verdict against the plaintiff on the facts. The decision was as follows:—(page 17.)

The law of these prayers, Nos. 1, 2, 3 and 4, is *granted by the Court*, but upon the hypothesis offered, *the Court finds a verdict for the defendant.*

POINTS.

It is obvious, from the foregoing statement of the whole case, that the plaintiff in error, suing for the price alleged to have been paid by it, for certain stocks, proceeded upon the theory of fact, that they had been *purchased* by it for investment or speculation; and upon the theory of law, that such a purchase by a National Bank, was *ultra vires* and void. No other question either of law or fact was raised in the case, and the Record shows (p. 18,) that the attorneys of the plaintiff in error, contended for these two propositions only, and argued them separately. The Court below fully concurred with the plaintiff in error in its proposition of law, in all the different forms in which it was raised and stated, and decided in its favor accordingly. It refused however to adopt the theory of facts contended for, and having determined that the stocks were not acquired by *purchase* at all, found a verdict for the defendant.

Here the Court might properly have stopped, as the case was entirely disposed of. But it saw fit to express in writing its opinion upon the facts, and to state in very general language, what it found the nature of the transaction to be. (Page 17.) That it was not a case of purchase as claimed, but a transaction in which the plaintiff made a fair and bona fide compromise of a legitimate claim of the defendant against it for $55,000, and incidentally acquired the stocks as a means of reducing its loss under that compromise. Interpreted by the light of the evidence in the case, the finding though imperfectly expressed, meant undeniably this.

"There are no elements of purchase or sale in this transaction at all. No money consideration whatever passed between the parties in reference to the stocks, and there is therefore no money to be recovered as claimed. The Court finds the transaction to have been one in which the defendant in error held a certificate of deposit for $55,000, issued by the plaintiff in error, and also certain stocks, the whole being collateral security for a loan of $80,000-

The claim for $55,000 was conceded to be legitimate, but the plaintiff in error having already improvidently paid it once to a third party, a fair and bona fide compromise was entered into between the two banks, under which the plaintiff in error, paid to the defendant in error, $40,000 for its certificate, and at the same time, in order to diminish its loss, it demanded and received from the defendant in error, a portion of the stocks which it held with the certificate as collateral security for the debt thus paid in part. The Court finds that the $40,000 was paid to retire the certificate, and not in whole or part as a consideration for the transfer of the stocks, as stated by the witness Wilkes. The plaintiff therefore is not entitled to recover." This, whether it was right or wrong, was unquestionably the meaning and substance of the Court's finding upon the facts of the case.

Now, in this finding, the Court below, though it was not required to express any further opinion upon the law, than its assent, as given to the propositions contended for by the plaintiff, superadded this general statement: that a National Bank had a right "*under such circumstances*," to save itself from loss by an "*arrangement*," under which it received stocks to be turned into money to diminish its loss. This was certainly never intended by the Court below, as the decision of any controlling proposition of law at all. If it had been, the special finding would necessarily have contained a more precise statement of the 'circumstances,' which the Court had in its mind, and of the character and facts of the 'arrangement' to which it referred, as above more fully explained from the evidence. Without such, the soundness of the opinion as a judicial one, could not be tested; nor could it be determined whether the point decided was a controlling one, upon which the plaintiff's right to recover depended. As stated, it really amounted to no more than the assertion of a general and abstract proposition of law; that there were 'circumstances' under which a National Bank might make a valid 'arrangement' to receive stock to be turned into money, to avert or diminish a loss. It was insisted in the Appellate Court, that there was properly nothing in the opinion under the Maryland practice to sustain a right of appeal. That Court, however, while it conceded this question to be fairly open, failed to decide it, because it concurred with the Court below, in the soundness of the general proposition of law asserted in its opinion.

And now, the plaintiff in error contends in this Court, that the State Court has decided a Federal question against the right claimed by it; and that the question is one which controlled its right to recover.

The defendant in error will contend that the so-called Federal question, in view of the facts found by the Court, was not a controlling question at all; because whether rightly decided or not, the plaintiff in error, upon the whole case was clearly not entitled to recover.

And further, that upon a proper interpretation and understanding of the question actually determined, the decision was correct.

I. Reversing the order of these questions, the first inquiry is, as to the correctness of the proposition decided. And herein first, as to the precise character and scope of that proposition.

It is necessary, as before stated, to connect the opinion with the evidence in the case, to give point and meaning to the general language used by the Court in its finding upon the facts, and to render that finding sufficiently intelligible and precise, to form the basis of any proposition of law at all.

But it must be conceded, that no facts can be interpolated into the finding, except such as are necessary to explain it, and which are necessarily to be inferred from it. Such facts as are therein stated must be accepted as absolutely true, whether the evidence appears to justify the finding or not; and also such as are necessarily to be inferred from those found. Now as the proposition of law is simply that a National Bank may under certain circumstances save itself from loss, by an arrangement under which it receives stocks to be turned into money; the question is, what in fact are the circumstances, and what the arrangement, which the Court has found to exist.

It is first to be remarked, that as the Court has determined as matter of law, that the bank could not acquire stocks for investment or speculation, and as matter of fact that they were not acquired by purchase, and yet that it had the right to receive these stocks, it follows necessarily as a fundamental part of the transaction that they were *in fact* not acquired by purchase at all, nor

were they acquired for purposes of investment or speculation. The necessary inference from these facts is, that the plaintiff in error did not pay anything for them, though, nevertheless, it acquired the right to them. For if it did not *purchase*, it clearly could not pay for them; and if it did not acquire them for investment or speculation, it did so because it had some right, otherwise than by purchase, to receive them. When we come to look further as to the circumstances under which the Court finds that they were received, all that is stated is, that the defendant in error having a legitimate claim for $55,000 against the plaintiff in error, the latter entered into a fair and bona fide compromise with the former, under which it discharged that claim and received the stocks—that is all.

If these were the only facts upon which the question of right depended, it would be impossible intelligently to determine it, for the circumstances *of the receipt* are not specially found at all.

Hence, the plaintiff in error is itself, throughout its brief, forced into the position of referring to the evidence in the case as explanatory of the Court's finding. And when we look at the evidence, as before suggested, we find as fundamental, *undisputed facts*, that the defendant in error held as collateral security for a loan of $80,000, a certificate of deposit issued by the plaintiff in error for $55,000, and also certain stocks; that the two banks entered into a compromise, under which the plaintiff in error paid the defendant in error $40,000, and received its certificate, and received also at its instance and request, a part of the stocks so held by the defendant in error. These conceded facts clearly explain the Court's finding to be this: "The stocks were not *purchased*. The $40,000 was paid as a compromise of the $55,000 certificate, and the stocks were received not by way of purchase, nor for investment, nor for speculation, but as a surrender conceded to be due to the debtor bank of part of the securities held by the creditor bank." And 'under these circumstances,' the Court says, as matter of law, a National Bank has a right to save itself from loss by receiving the stocks to be turned into money. And this is the proposition, the correctness of which is to be determined.

Before proceeding to consider this question, it is proper to notice a manifest error into which the attorneys for the plaintiff

in error have fallen, in assuming, in point I, p. 10 of their brief, that the Court below expressly declared by its verdict, *that the money was paid wholly for the stocks.* This conclusion is argued from the fact, that the plaintiff's 3d prayer proceeded upon the theory, that the money was paid for the certificate and stocks *together;* and that the Court having declared by its verdict that this assumption was incorrect, must be held to have determined that the money was paid for the stocks only. The plaintiff's 3d prayer (p. 16,) was based upon the hypothesis of a *purchase* (by payment of $40,000,) of the certificate and stocks together; and when the Court by its verdict determined emphatically that there was no *purchase of the stocks at all*, the necessary conclusion is, *not* that the whole of the money was paid for the stocks, but on the contrary, that it was wholly paid for the *certificate.*

And it is also an unfounded assumption that the finding of the Court was grounded upon any idea of the nature of the contract, in conflict with the ruling of this Court in Philpot vs. Gruninger, 14 Wallace. On the contrary, it is entirely consistent with that decision. The Court below, no doubt found that the payment of the certificate by the plaintiff in error, was the *motive* to the surrender of the stocks by the defendant in error, but not the *consideration* for it. Nothing is consideration which is not regarded as such by *both* parties; and the evidence showed the Court that each of them regarded the transaction in a different light.

The Court considered, that although the surrender of the stocks may have been part of the compromise entered into and may have been agreed to be made, provided the certificate was paid for; nevertheless, that the payment for the latter was not the consideration in whole or in part, for the surrender of the former. That the pre-existing indebtedness on the certificate was the true consideration of the transaction; and its payment, the motive to the simultaneous contract, for the surrender of the stocks. In the language of the Court in the case referred to (substituting the word "payment" for "note,") a creditor may do a favor to his debtor, and enter into a new and independent contract; induced by which the debtor may assent to pay a previously existing indebtedness. Without the favor or new contract, there is in such case full consideration for the payment; and the parties may not have contemplated that the favor or new contract was to

be paid for. To regard these as entering into the consideration for the payment, would be to make a contract for the parties, to which the minds (of *both* of them,) never assented."—(p. 577.)

Assuming then the proposition of law decided by the State Court to have been correctly stated as above, it becomes unnecessary to consider the greater part of the argument of the attorneys of the plaintiff in error; for it proceeds upon the erroneous assumption as just shown, that the stocks were purchased, and that a money consideration was paid for them.

All therefore, that is claimed in the plaintiff in error's brief, and all that is decided in the various authorities cited (with the exception perhaps of the 'obiter dictum,' in 72 Penna. Reports,) in reference to limitations to be imposed upon the acquisition of stocks by National Banks, may be conceded to be correct; and yet under the circumstances as found in this case, the bank must be held to have acquired a valid title to the stocks. The National Banks (under sect. 8,) "may exercise all such incidental powers *as shall be necessary to carry on the business of banking.*"

The words "by discounting, &c.," which follow, were not intended to limit the exercise of their incidental powers, but to limit the *kind* of banking to be done. That is to say, they are authorized to carry on banking by discounting, &c., and exercise all incidental powers necessary for *so* carrying on banking. (Henkle vs. 1st National Bank of Ripley, 22 Ohio, 524.)

Among the modes specified is "by loaning money on personal security." It never seems to have been doubted until the obiter dictum of J. Agnew, in 72 Penna. Rep., (Sharswood and Williams dissenting,) that this clause referred to loans made on the security of personal, as distinguished from real property. There is probably not a National Bank in the country which does not at this time, from the necessities of its business, deal largely in loans on this species of security. The point is directly raised in 2 Abbott's U. S. Ct. Ct. Repts., p. 423, in which it was most reasonably decided, that loaning money on "personal security" was a power superadded to that of "discounting and negotiating promissory notes, &c.," and that as the latter involved loaning on the credit of persons, the words "personal security" must mean something more, and referred to loans on

"personal property." The correctness of this judgment might, if necessary, be demonstrated by reference to other illustrative provisions of the act which declare what is prohibited, i. e.: loaning on their own stocks—taking real estate as security, except for antecedent debts—and other matters.

But it is deemed unnecessary to elaborate the argument. The power to receive and hold stocks as security for debts, antecedent or created, being then assumed, how can it be doubted, that as incidental to this power, they may be absolutely acquired if necessary, by a sale of the pledge, or in satisfaction of a debt, or by a surrender (as in this case,) of securities to which the bank becomes equitably entitled by substitution, on payment of the debt for which they stand pledged. All such powers are exercised by a bank for its protection and indemnity in carrying on its legitimate business, and they are fully conceded in the cases most relied on upon the other side. In Talmage vs. Pell, 3 Selden, p. 343, it is said that "they can purchase stocks to deposit with the Comptroller—*may invest their surplus funds in them*—may loan money on them by way of a pledge, and therefore lawfully acquire title when sold to enforce a lien. All these powers are incident to the power to *conduct the business of banking.*" Even J. Agnew, in 72 Penna., under the limited views expressed by him as to the construction of the words 'personal security,' intimates (p. 462,) that there may be power "to accept a hypothecation of stocks in addition to, and to strengthen a loan, though not to *create* it." And all the cases referred to, while the power to *traffic* or do *business* in stocks as such, is properly denied to the National Banks, their power to receive them as security for loans, to buy them when sold under their liens, to take them in settlement of claims, and to acquire them for indemnity from loss, in any transaction "admitted to be a legitimate banking transaction," is either expressly or impliedly conceded.

And it is respectfully submitted, that to deny the existence of such incidental powers, would be so to limit the granted banking powers, and so embarrass and restrict these institutions in effecting recoveries, adjustments or compromises of claims held by or against them in their ordinary business, as seriously to impair both their usefulness and their resources.

If these views be sound, and the proposition of law decided by the State Court be such as is above stated, its correctness cannot be questioned.

II. It has already been suggested, that the Court below never meant to decide the question here in controversy, as controlling the issue; but casually, and by way of obiter dictum only, expressed an opinion in regard to the right of the plaintiff in error, to receive the stocks under the circumstances found to exist.

It was a question not raised by the plaintiff in error, whether the right existed under *these* circumstances; for it was quite obvious, that under such a state of facts, no right of recovery of the $40,000 could be maintained at all; and it was therefore quite immaterial whether the Court was right or wrong in deciding the so called Federal question. When the Court declared that if the money had been paid for the stocks, the transaction would have been void, it decided the only controlling Federal question in the case, and that in favor of the right claimed by the plaintiff in error. But when it found, as matter of fact, that the transaction was no purchase at all, that the money was paid for the certificate, and that the stocks were incidentally received, it was quite immaterial to the issue in the case whether the plaintiff had or had not the right to receive and hold those stocks, and quite unnecessary for the Court to express any opinion on that point.

The determination of the question therefore, even if erroneous, is no cause for reversal; because the issue raised by it is not so controlling, that its correct decision was necessary to a final judgment in the case; and it is manifest that the other issues of law and fact adjudged, (and not now open to review,) are sufficiently broad to maintain the judgment of the Court. Murdoch vs. City of Memphis, 20 Wallace, 636. And it is also the settled practice in Maryland, not to order a procedendo, because of an erroneous ruling in the Court below, when it is manifest from an examination of the whole case, that the appellant was not damaged by the ruling complained of. Hanson vs. Campbell's lessee, 20 Md., 233.

The action was for money had and received. When the Court determined that it had been paid in compromise of a claim conceded to be legitimate, the payment must be treated as having been made in discharge of a legal obligation. It became then, as soon as received, money of the defendant, which equitably it had a right to retain, and the contract having been executed by a delivery and cancellation of the certificate, the money could never be recovered back under this form of action.

If the plaintiff in error, for any purposes of its own, either to diminish the loss sustained by settlement of the certificate (as the Court assumes,) or for the purpose indicated in the evidence, of carrying the stocks "as a suspended debt account," to the amount of $40,000, in order to square its books for the eye of the Government Examiner, chose to demand and receive these stocks as part of the security held for the debt which it had discharged; and if that part of the transaction was 'ultra vires' and void, then it simply follows, that the plaintiff in error acquired no title to those stocks. It must accept the consequences of that result, if it sees fit to raise the question. But whatever the consequences of its disclaimer might be in reference to the rights of the defendant in error to the stocks, it certainly could not create a right in the plaintiff in error to recover back the $40,000, or any part of it, as money had and received by the defendant in error, as purchase money for the stocks, when it was determined that no money at all had been paid for that purpose.

This view of the case assumes that the settlement for the certificate (which being a fair and bona fide compromise of a claim conceded to be legitimate, was certainly not of itself 'ultra vires,') was not tainted with any infirmity by reason of an unauthorized transfer of the stocks in the same transaction. And such would seem to be the reasonable view.

The plaintiff in error makes the point that the right to compromise in such a case, is only an implied power, and that another implied power, i. e., to take the stocks, cannot be founded on it; but it does not contend that the whole compromise is void, because in the exercise of the power, something else is done which is 'ultra vires.' The transaction may be good in part and bad in part, unless the two parts are so dependent

that one cannot stand without the other. And whether so dependent, might be quite a different question when made by one party to the contract from what it actually is when made by the other. Whether the defendant in error could reclaim the stocks without cancelling the whole compromise, might be doubted; but it does not follow that the plaintiff in error may impeach a fair and bona fide compromise made of a legitimate claim against it, because it chooses to repudiate and disclaim its own title to stocks which it incidentally acquired, without paying any thing for them, in connection with that compromise.

It would not, however, aid the plaintiff in error, if it could establish the proposition, that the entire contract was invalid for want of authority to make it; for no right to recover in this case could be shown, even if that were a correct view of the law. It was not by any means a concession of the lower Court, that in such an event the plaintiff might recover; nor does the Maryland authority referred to (Foreman vs. Md. Hospital, 29 Md.,) settle that question at all, as it is claimed to do. The concession below was simply, that the plaintiff might recover the money paid for the stock, if it could show that it had paid any; not that it could recover the money paid for the certificate, even if the whole transaction was unauthorized. Nor does the case referred to sustain any such right. It is true that the Maryland case establishes the general doctrine that the defence of "in pari delicto" does not apply when the contract is simply 'ultra vires,' but it recognizes also, that if the action be for money had and received under such a contract, "it being in its nature an equitable action, the measure of the plaintiff's recovery *must be determined upon equitable principles.*" (Page 532.) Both of the New York cases cited, establish the same rule. In Tracy vs. Talmage, 14 New York, the Court (page 180,) appears to have been inclined to the opinion that contracts of corporations which are 'ultra vires,' "come within the general rule which denies all aid to either party to a contract made in violation of law." But it excepted the case at bar from that rule, (p. 181,) because the parties were not in "pari delicto," and held that though the contract be illegal, "the Court would afford relief *where equity required it*, to the more innocent party." In Curtis vs. Leavitt, 15 New York, the doctrine is more positively asserted that no "delictum" can be imputed to either party, where the

contract is simply unauthorized; as it may be where it is in violation of morals or prohibited by law. But though such a contract cannot be enforced, "it does not follow that the alleged transgressor may appropriate without compensation, the money, the goods, or the services of the party with whom it deals;" (p. 240.) The result of all the authorities then, is this: Even after a contract, entered into 'ultra vires,' has been fully executed, the Court will interfere to set it aside; but this will only be done where both parties can be restored to their 'statu quo,' and the measure of recovery by either party, there being no 'delictum' in the case, "must be determined upon *equitable* principles." 29 Maryland.

Apply the rule to this case: The action is for $40,000, "money had and received by the defendant belonging to the plaintiff, *which it is against equity and good conscience for it to withhold and retain.*"—*See Narr*, (p. 5.) Now if the plaintiff in error had a right to treat the whole transaction as unauthorized, it certainly could not be allowed under this equitable action to get back into its original position, without putting the defendant in error also in 'statu quo.' It could not recover the money it paid, without a surrender in unimpaired value and validity of the certificate of deposit previously held by the defendant in error. This it could not do, and did not even offer to do. The certificate had been mutilated and impaired as a cause of action, by endorsements made upon it by the plaintiff in error, that it was satisfied by settlement *with Bayne, December*, 1865, and cancelled. A recovery upon it was also absolutely barred by the Maryland Statute of Limitations; and it was therefore worthless. No tender of it in any form, was made prior to the suit. And at the trial of the cause, (page 10,) the plaintiff's attorneys, without offering at all to recall or expunge the endorsements upon the certificate, tendered it to the defendant simply with a *verbal* offer not to plead limitations in the event of a suit upon it. They did not pretend to exhibit or hold any lawful warrant of attorney from the plaintiff in error to enter into any such agreement on its behalf; and therefore, even assuming the offer to have been made in good faith on their part, the tender was so irregular and inoperative in all respects, that there was nothing in it to preclude the plaintiff in error, if it saw fit, from raising thereafter, in case of suit, any defences by way of limitations or otherwise,

which the lapse of time, and the altered situation of the parties, and the mutilation of the certificate and other circumstances occurring before or since its original transfer to the defendant in error might have suggested to other counsel. And looking to the previous conduct of the plaintiff in error as disclosed by the evidence; (page 11,) when finding itself disappointed, after the lapse of some years, in the advantages it expected to reap from the settlement made, it attempted to force the defendant in error into a surrender of its rights by charges of fraud and false representations against its officers, which it was subsequently compelled to withdraw as malicious and wholly untrue, and without foundation; and when afterwards, upon the fullest concessions from its president, who arranged the compromise, that it had been consummated with full knowledge on his part of all the facts, and fairly and 'bona fide,' and without any representations whatsoever on the part of the defendant in error, it attempted to repudiate the transaction merely on the ground of its legal inability to enter into it, it is quite fair to presume, that if the tender of the certificate as made, had been held to be sufficient, it would have repudiated with equal indifference to moral obligations, all offers and agreements of its present attorneys, which limited and restrained in any way, any defences it might see fit to set up to a suit thereafter on that certificate.

Under all these circumstances, the suggestion of the plaintiff in error as made on page 22 of its brief, that this Court should not only reverse the judgment of the Court below, but that it should proceed to *enter up judgment here for the full amount of its claim* is so manifestly inequitable and unjust, that it almost deserves to be stigmatized with the very emphatic language of condemnationused by the Court in a like case of Mott vs. U. S. Trust Co., 19 Barbour, 569, where the plaintiff having borrowed $10,000 from a Savings Bank, on the pledge of *private* stocks when it was only allowed by its charter to loan on *public* stocks, asked for an injunction to restrain the collection of his notes, *after the securities had proved worthless*, on the ground that the transaction was '*ultra vires*' and void. The Court said "the proposition carries with it, its own refutation, &c., &c.

It remains only to be shown on this point, that the Court below, on grounds independent of its opinion upon

the Federal question, virtually decided, that the plaintiff in error had no right to recover any money paid on account of the certificate of deposit, and therefore had no right to recover at all.

By examining the third proposition, which it announced as governing the case, (page 16,) it will be found that it determined as matter of law, that if the $40,000 was paid for the purchase of the certificate of deposit *and* the stocks *together*, the plaintiff was entitled to recover, (*not* what had been paid for the *certificate*,) but only "*so much* of the sum so paid, as the said Court should find was paid *for the said stocks*." When, under this governing proposition, the Court found a *verdict for the defendant*, it found necessarily by that verdict, that no money at all had been paid for the stocks; and finding also, as the only other alternative, that the money had been paid wholly for the certificate, it necessarily entered a verdict for the defendant, *under the law of the 3d prayer*, by which it was determined that only *so much* of the money could be recovered, as should appear to have been paid for the *stocks*. If this be so, it matters not whether its opinion on the Federal question was right or wrong.

III. The plaintiff in error seeks to maintain in one of its points, (p. 23,) that there was a right of appeal in the State Courts, from the decision of the lower Court here in controversy. That question was not determined by the Appellate Court.

It does not appear to be open in this Court—unless the plaintiff's right to a writ of error should depend upon the question, whether the Maryland Court of Appeals had any jurisdistion to pass judgment upon the so called Federal question.

If that should be deemed a proper inquiry, it is respectfully insisted, that the Appellate Court had clearly no right to consider and adjudicate the question in dispute.

The Maryland Code, Art. 5, S. 12, Public General Laws, provides that the Court of Appeals shall in no case decide any point or question which does not appear by the Record to have

been *raised or made in and decided* by the Court below. The rules of the Court of Appeals, Vol. 29, Maryland Reports, p. 2, provide as follows: 4 "In no case shall the Court of Appeals decide any point or question, which does not *plainly* appear by the Record to have been *tried and decided* in the Court below," &c., &c.

In the case of Tinges vs. Moale, 25 Maryland Reports, p. 484, it was determined, that the provisions of the constitution, authorizing facts to be submitted to the trial of the Court, without the aid of a jury, did not alter in any way the jurisdiction of the Appellate Court. "With the facts as found by the Court below, upon such a submission, this Court has no more to do upon appeal, *than if they had been found by a jury.* It is only upon the *law* arising upon the facts, *and raised in the modes adopted in our practice*, that this Court has to deal in appeals from judgments; and when such questions appear by the Record to have been *raised* and decided below, the right of appeal is undoubted, &c."

The question then must be raised "in the modes adopted in our practice," and *tried and decided.* That practice has always been to raise all governing questions of law by prayers for instructions to the jury.

The whole subject is fully treated in Evans' Maryland Practice, p. 364, et seq. "It is so well settled to be law in Maryland, that a Judge is not to 'sum up' or even charge the jury upon the law, that no Judge ever thinks of doing either."

"If either party desires it, it is his business to pray the Court for such an instruction as he thinks will suit his case." "*The Court may either grant it or refuse it, and thereupon instruct the jury in its own words, &c.*" "Care must be taken that the prayer calls the attention of the Court to the *precise question of law*, which the counsel has in view. For upon appeal he will not be permitted to insist upon any point, not raised or made in the Court below." —(p. 371.)

The only question of law, therefore, in the case, which could properly be considered as having been *raised and decided* below, "in the modes adopted in the Maryland practice," were those raised by the plaintiff's 4 prayers.

The proposition of law contained in the Court's opinion was not, strictly speaking, raised at all.

The case was fully decided both upon the law and the facts before it was suggested. It was not even then raised by either of the parties to the suit. It was not necessary that it should have been raised or announced at all, in order to determine the case upon the points which were submitted. Nor was it, as announced, clothed in such form according to the Maryland practice, as to enable the Appellate Court to comprehend with certainty, the *precise* hypothesis of facts, to which it was addressed, as a legal conclusion, and whether it was a ruling *against* the appellant, upon any points *raised* by it in the case. Therefore, under the Code and practice above referred to, the Court of Appeals of Maryland had no right to determine whether a 'dictum' of the Court below contained in its opinion *upon the facts* of the case, after deciding in favor of the plaintiff, all controlling questions of law raised by it, was right or wrong.

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